



International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration

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ABSTRACT (ENGLISH)

The focus of this research lies on international migration as a strategy to adapt to changing environmental conditions, and on the legal frameworks needed to facilitate such international adaptive migration. More in particular, the relevance of both international environmental law and regional migration law to deal with environment-induced migration is scrutinized. The objective of the thesis is to discuss whether existing legal and policy frameworks in these areas are sufficiently equipped to facilitate international adaptive migration, and to analyse if and how those frameworks should be adapted to this end.

This thesis therefore reviews the existing social science and legal literature as well as the global policy debate on the topic, leading to a typology and definitions of environment-induced population movements. International environmental law is then analysed as a possible legal framework to facilitate international adaptive migration. Furthermore, through a case study of European migration law and policy, this thesis examines how adaptive migration can be brought to practice, focusing on the European Union. The study finally leads to a set of legal and policy options to support and facilitate international migration as a strategy to adapt to a changing environment, thereby bridging the gap between environmental law and migration law as two separate legal frameworks to address this issue.

ABSTRACT (DUTCH)

De focus van dit onderzoek ligt op internationale migratie als een strategie om zich aan te passen aan een veranderend leefmilieu, en op de juridische kaders die nodig zijn om dergelijke internationale adaptatiemigratie te ondersteunen. In het bijzonder wordt de relevantie van zowel internationaal milieurecht als regionaal migratierecht voor de behandeling van milieugerelateerde migratie onderzocht. Het doel van dit proefschrift is om te onderzoeken of de bestaande juridische en beleidskaders in deze takken van het recht voldoende zijn uitgerust om internationale adaptatiemigratie te ondersteunen, en om te analyseren hoe deze kaders eventueel moeten worden aangepast.

Daarom worden in dit proefschrift de bestaande sociaalwetenschappelijke en juridische literatuur en het internationale beleidsdebat rond dit onderwerp onderzocht, hetgeen leidt tot een typologie en definities van milieugerelateerde migratiestromen. Vervolgens wordt het internationaal milieurecht geanalyseerd als een mogelijk juridisch kader ter ondersteuning van internationale adaptatiemigratie. Door middel van een casestudy van het Europese migratierecht en –beleid wordt daarna onderzocht hoe adaptatiemigratie in de praktijk kan worden gebracht, meer bepaald in de Europese Unie. Dit onderzoek leidt tot slot tot een reeks juridische en beleidsopties om internationale migratie te ondersteunen en faciliteren als een strategie om zich aan te passen aan een veranderend leefmilieu, waarbij de kloof wordt overbrugd tussen milieurecht en migratierecht als twee aparte juridische kaders om dit onderwerp te benaderen.

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LIST OF ABBREVIATIONS

AF	Adaptation Fund
AFB	Adaptation Fund Board
AU	African Union
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action under the UN Framework Convention on Climate Change
CBA	community-based adaptation
CBD	Convention on Biological Diversity
CEAS	Common European Asylum System
COP	Conference of the Parties
DG	Directorate-General
DG CLIMA	Directorate-General Climate Action
DG DEVCO	Directorate-General EuropeAid Development and Cooperation
DG ECHO	Directorate-General Humanitarian Aid and Civil Protection
DG HOME	Directorate-General Home Affairs
DRRs	Disaster Risk Reduction Strategies
DWCPs	Decent Work Country Programmes
EACH-FOR	‘Environmental Change and Forced Migration Scenarios’-research project
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOWAS	Economic Community Of West African States

ECtHR	European Court of Human Rights
EC Treaty	Treaty on the European Community
EEAS	European External Action Service
EU	European Union
EU Temporary Protection Directive	Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
EU Qualification Directive	European Council, Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
FAS	Fundació Pagesos Solidaris (Foundation for Peasant Solidarity)
FPP	Forest Peoples Programme
GAMM	Global Approach to Migration and Mobility
GCF	Green Climate Fund
GEF	Global Environment Facility
GFMD	Global Forum for Migration and Development
GLOF	Glacial Lake Outburst Flood
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMPD	International Centre for Migration Policy Development
IDMC	Internal Displacement Monitoring Centre
IDP	Internally-displaced person
ILC	International Law Commission
IOM	International Organisation for Migration

IPCC	Intergovernmental Panel on Climate Change
JHA	Justice and Home Affairs
Kampala Convention	Convention for the Protection and Assistance of Internally Displaced Persons in Africa
LDC	Least Developed Country
LDCF	Least Developed Countries Fund
LDFA	GEF Land Degradation Focal Area
LEG	Least Developed Countries Expert Group
MEA	multilateral environmental agreement
MENA	Middle East and North Africa
Migrant Workers Convention	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
MOP	Meeting of the Parties
MRF	Munich Re Foundation
NAP	National Adaptation Plan (UNFCCC)
NAP	National Action Programme (UNCCD)
NAPA	National Adaptation Programme of Action
NGO	non-governmental organisation
NRC	Norwegian Refugee Council
OAS	Organisation of American States
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
PAC	Pacific Access Category
RAP	Regional Action Programme
PRSPs	Poverty Reduction Strategy Papers
REDD+	Reduced Emission from Deforestation and Forest Degradation
SBI	Subsidiary Body for Implementation

SBSTTA	Subsidiary Body on Scientific, Technical, and Technological Advice
SCCF	Special Climate Change Fund
SPA	Strategic Priority on Adaptation
SRAP	Sub-regional Action Programme
TCLM	Temporary and Circular Labour Migration
TEU	Treaty on the European Union (Maastricht Treaty)
TFEU	Treaty on the Functioning of the European Union
TPS	Temporary Protection Status
UK	United Kingdom
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
UNCED	1992 UN Conference on Environment and Development (Rio Earth Summit)
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
UNU	United Nations University
UNU-EHS	United Nations University Institute for Environment and Human Security
US(A)	United States of America
USD	United States Dollar
1951 Refugee Convention	Convention Relating to the Status of Refugees of 1951

Introduction

1. GENERAL INTRODUCTION TO THE PHENOMENON OF ENVIRONMENT-INDUCED HUMAN MOBILITY

Worldwide, migration tends to be the topic of very lively and often heated policy debates. Within the general migration discourse, environment-related migration is one of the newest and mostly debated issues. Ever since the Intergovernmental Panel on Climate Change (IPCC) recognised that “one of the gravest effects of climate change may be those on human migration” in 1990¹, academic research on this topic has boomed. Obviously, environment-induced population movements are not a new phenomenon. People have always used migration as a strategy to adapt to changes in their environment. People driven from their homes by the Dust Bowl in the 1930s in the United States are early examples of so-called ‘environmental refugees’². And even in prehistoric times, populations migrated in search for a better environment. However, at a time when our environment is under huge pressure, the urgency of the topic becomes more apparent. The effects of global warming, biodiversity loss and natural disasters are increasingly causing large-scale population movements. Climate change-induced sea level rise, desertification and increased droughts threaten to render certain regions uninhabitable in the near to further future. For instance in the late 1980s and early 1990s, about 100.000 people - representing 1 in 16 of the inhabitants - emigrated from Karakalpakstan, an autonomous republic of Uzbekistan, partly because their livelihood was threatened due to the human-induced evaporation of the Aral Sea³. People are furthermore displaced by sudden-onset environmental disasters, such as earthquakes, floods, hurricanes and

¹ Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2007’, Fourth Assessment Report, Contribution of Working Group II on ‘Impacts, Adaptation and Vulnerability’, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson (eds), Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 72; E. Goffman, ‘Environmental Refugees, How Many, How Bad?’, CSA Discovery Guides, June 2006, available at:

<http://www.csa.com/discoveryguides/refugee/review.pdf>. The Dust Bowl of the 1930s was a series of serious dust storms in the United States, caused by severe droughts coupled with decades of extensive farming. It caused a lot of ecological and agricultural damage, forcing thousands of people to leave their houses.

³ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 72.

volcanic eruptions. The volcanic eruption on the Caribbean island of Montserrat in 1995 for example forced 7.000 people to evacuate⁴, and in 2005 nearly 1 million persons were displaced in the aftermath of the Katrina hurricane in New Orleans⁵. Due to climate change and ecosystem degradation, regions particularly vulnerable to natural disasters are expected to face an increase in the occurrence and severity of those disasters⁶.

When people's livelihoods are threatened by such environmental disruptions, a traditional response is to migrate. The past decades, most academic research focused on the negative consequences of environmental changes for human mobility, namely the forced displacement of people, and the lack of protection mechanisms for those which are forced to leave their environment in order to survive. The debate was very often dominated by emotional appeals for the drowning population of sinking island states in the Pacific Ocean. However, since a couple of years, it is increasingly recognised that migration should not only be regarded as a failure of adaptation to environmental changes, but that migration itself can be a positive adaptation strategy for vulnerable communities. Evidence from field-based research confirms that migration can help people to adapt to a changing environment, for example by providing them with an alternative livelihood, or by relieving population pressure in affected areas.

The challenges posed by environment-induced human mobility require a new strategic policy approach. Policymakers will need to take measures to prevent environment-induced migration where possible, by preventing environmental changes from happening, or by reducing the impact of environmental disruptions on communities. However, they will also need to take measures to prepare for environment-induced migration where it cannot be avoided. And where migration can act as a positive adaptation strategy, policies that facilitate such 'adaptive migration' will be needed.

⁴ D.C. Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change', 23 *Population and Environment* 5, 2002, p. 471.

⁵ B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Env'tl. L.J.*, 2007, p. 68-69; Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 13.

⁶ J.B. Cooper, 'Environmental Refugees: meeting the Requirements of the Refugee Definition' 6 *N.Y.U. Env'tl. L.J.* 480, 1998, p. 503; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 369-371.

2. OBJECTIVE OF THIS STUDY

In this doctoral study on *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration*, the aim is to examine whether and how different legal frameworks could facilitate international migration as a strategy to adapt to a changing environment. More in particular, the relevance of both international environmental law and regional migration law to deal with environment-induced migration is scrutinized. The objective of the thesis is to discuss whether these existing legal and policy frameworks are sufficiently equipped to facilitate international adaptive migration, and to analyse if and how those frameworks should be adapted to this end.

This text, which is submitted as a Ph.D. dissertation to the Faculty of Law of Ghent University in order to obtain the degree of Doctor of Law, is the result of a 4-year BOF research project. The original title “Erkenning en bescherming van milieuvluchtelingen in de EU” (“Recognition and protection of environmental refugees in the EU”) was not withheld. As such, the initial research was aimed at studying legal protection mechanisms for “environmental refugees” arriving in the European Union, through a study of national and European migration law. However, during the course of the research it was found that the applicability of existing asylum regimes, in particular in the European Union, was for a large part irrelevant in practice, was relatively quickly concluded upon, and had already been extensively studied. Furthermore, it became clear that in order to be able to develop relevant policy recommendations regarding international adaptive migration, which had become the main concern of this study, also environmental law would have to be studied.

It should be made clear though from the start that one delimited research project cannot exhaustively encompass all of the relevant elements in the debate on environment-induced migration. The focus of this research consequently came to lie on international migration as a strategy to adapt to changing environmental conditions, and on the legal frameworks needed to facilitate such international adaptive migration. More in particular, the aim is to bridge environmental law and migration law in addressing this issue, with a view to come to recommendations regarding the decisions and choices which policymakers need to take today to address future challenges and opportunities arising from environment-induced population movements.

3. METHODOLOGY AND ADDED VALUE OF THIS STUDY

This thesis is the result of a theoretical, doctrinal, legal research. It includes both descriptive legal research, by identifying and describing existing legal standards applicable to environment-induced population movements, as well as normative legal research, including the development of policy recommendations regarding the necessary legal frameworks to support international adaptive migration.

The research has been carried out by means of a thorough literature research. A large and diverse body of literature in the field of both migration and environmental law has been analysed, in the form of books and book chapters, peer-reviewed articles as well as internet-based sources. The study is undertaken with the aid of various sources of international law, as enumerated in Article 38 of the Statute of the International Court of Justice (ICJ)⁷, and is grounded in different branches of international, regional and national law (*see further under Chapter I, Section 2.2*). Furthermore, useful insights were gained through participation in numerous international and national conferences and seminars on environment-induced migration, and through informal contacts with both legal and other experts on the issue. Multi-disciplinary contacts with political, geographic and social scientists have proven to be invaluable sources to put the relevance of the research results to the test.

The added value of this study in comparison to the existing research on environment-induced migration lies mainly within its focus on international adaptive migration from a legal perspective. While a huge body of legal research already exists on legal protection mechanisms for environmentally-displaced persons (*see further under Chapter III*), most studies on migration as an adaptation strategy are in the field of political and social sciences, where little or no attention has been given to the legal challenges which would have to be overcome in order to facilitate international adaptive migration, such as those regarding legal residence and citizenship of environment-induced migrants. Furthermore, despite the plenitude of academic attention the issue has received over the years, no study exists that combines environmental law and migration law to address the issue. Most studies are dominated by a migration or environmental perspective, respectively leading to policy recommendations which lie far apart from each other. Finally, within international environmental law, most authors focus on international climate law, namely on how

⁷ Article 38, Statute of the International Court of Justice, adopted in San Francisco on 26 June 1948.

migration is addressed in the framework of the UN Framework Convention on Climate Change (UNFCCC), thereby neglecting other branches of environmental law. This study also has the added value of addressing other branches of international environmental law in relation to migration and environmental change.

4. STRUCTURE OF THE THESIS AND RESEARCH QUESTIONS

As mentioned above, the aim of this research is to discuss whether existing legal and policy frameworks in the field of international environmental law and regional migration law are sufficiently equipped to facilitate international adaptive migration, and to analyse if and how those frameworks should be adapted to this end.

This thesis is subdivided into three major parts. Given the importance of a good understanding of the phenomenon of environment-induced human mobility, PART I will start with an introduction to the research on environment-induced migration and the concept of adaptive migration. It reviews the existing social science literature and the global policy debate on the topic, and leads to a typology of environment-induced migration. After all, the way a phenomenon is conceptualised is crucial for the way its treatment is approached. More in particular, it helps to establish the appropriate branch of international, regional or national law to locate environment-induced migration, for instance within the existing regional framework for the protection of displaced persons, or within the UNFCCC⁸. The objective of PART II is to discuss whether international environmental law is an appropriate legal framework to facilitate and promote adaptive migration. Through a case study of migration law and policy in the European Union (EU), PART III finally looks briefly at how adaptive migration can be brought to practice, focusing on the EU. While PART II looks at international environmental law through a migration lens, PART III does the opposite, incorporating an environmental perspective into migration law and policy. The study finally leads to a set of legal and policy options to support and facilitate international migration as a strategy to adapt to a changing environment, thereby bridging the gap between environmental law and migration law as two separate legal frameworks to address this issue.

⁸ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 186.

Since the legal analysis in this thesis is made at two levels, namely international environmental law and regional migration law, the research questions are also divided into different subcategories.

1. Questions concerning the conceptualisation of international adaptive migration (PART I)

- What is the current knowledge base and the state of the debate on environment-induced migration? (Chapter I)
- How can adaptive migration be conceptualised within the general discourse on environment-induced migration? (Chapter II)
- How can international adaptive migration contribute to the adaptive capacity of individuals, households and communities affected by environmental degradation? (Chapter II)
- How can environmentally-displaced persons be protected under international law (Chapter III).

2. Questions concerning international environmental law (PART II)

The central research question which this part aims to scrutinize concerns the opportunities and limitations of international environmental law in dealing with environment-induced migration. More in particular, the following research questions will be studied:

- How is migration addressed in various branches of international environmental law?
- Can measures concerning adaptive migration be implemented through the implementation mechanisms of international environmental law?
- What is the added value of addressing migration through international environmental law?
- Does it matter for concrete adaptation actions on the ground whether or not migration is specifically addressed in the texts of the Conventions and/or in decisions of the Conference of the Parties (COP) to these Conventions?

3. Questions concerning European migration law and policy (PART III)

The last PART of this thesis aims to assess if and how migration law can facilitate international adaptive migration, from the perspective of the EU. More in particular, the following research questions will be studied:

- How is environment-induced migration treated at the European policy level?
- What forms of international migration constitute adaptive migration?

- How can environmental drivers of migration be integrated in the EU's migration law and policy?

PART I

Adaptive migration as part of environment-induced human mobility

A study on the legal frameworks supporting international adaptive migration would be incomplete without an overall picture of the debate on environment-induced migration, contextualising migration as an adaptation strategy within this debate. PART I of this study, which holds Chapters I, II and III, therefore contains a state-of-the-art review of the international discussion on the linkage between migration and environmental change.

Chapter I explains the conceptual framework which is used further in this thesis, gives background to the classification of environment-induced human mobility followed in this study, and provides the reader with an overview of literature on the topic so far. It contains a brief reprise of the debate on environment-induced human mobility in the international legal community, in order to provide context to a more in-depth analysis of migration as an adaptation strategy, which is the focus of this study in Chapter II. Chapter II then introduces the concept of adaptive migration, and critically assesses the relevance of international migration as an adaptation strategy. Furthermore, some of the legal challenges facing this theory will be revealed. For reasons of comprehensiveness, Chapter III briefly discusses the role of various legal frameworks in the protection of people which have been forcibly displaced for environmental reasons.

This Part by no means attempts to offer a comprehensive analysis of the research on environment-induced human mobility, but rather a mere introduction into the issue, as well as into some of the elements of the highly complex legal frameworks surrounding individuals migrating or being displaced due to gradual changes or sudden disruptions of their environment.

Chapter I. Environment-induced migration and displacement: a state-of-the-art review

“In my 80 years living as a pastoralist it has never been like this. The rainfall pattern has been unpredictable and there is a migration of pastoralists from this community to the urban centres of Nairobi, Uganda and others. The few animals we have that have survived the drought are plagued by new diseases that we do not know about. Our livestock is dying and we do not know why”.

Elder Bote Bora, 80 year-old Borana pastoralist in the Horn of Africa⁹

1. UNDERSTANDING THE PHENOMENON OF ENVIRONMENT-INDUCED HUMAN MOBILITY

The effects of global warming, natural disasters and other environmental destructions are increasingly causing people to leave their environment. Although it is difficult, if not impossible, to accurately predict the extent of environment-induced population movements (*see further in Section 1.1.3.*), scientists agree that these population movements are expanding. Together with the numbers, the awareness on the phenomenon of environment-induced migration is increasing, among academics as well as among policymakers and the general public. In recent years, the topic has even emerged at the negotiation table of the UN climate change negotiations (*see further in PART II, Chapter IV*). At the European level, the European Commission recently came up with a

⁹ United Nations Office for the Coordination of Humanitarian Affairs (UN-OCHA), United Nations Environment Programme (UNEP), International Organization for Migration (IOM) and the Institute for Security Studies (ISS), ‘Security in Mobility: Advocating for Safe Movement as a Climate Change Adaptation Strategy for Pastoralists in the Horn and East Africa’, June 2010, Paper available at: http://reliefweb.int/sites/reliefweb.int/files/resources/8E4A32AF1BCEE2544925775800065831-Full_Report.pdf, p. 4.

Commission Staff Working Paper on the issue, as part of the EU Adaptation Strategy package¹⁰ (see further in PART III).

Research on environment-induced population movements has been hindered by a “lack of conceptual clarity”¹¹. A clear theoretical frame is thus required, in order to facilitate research on this topic. This would enable researchers and policymakers to communicate on the same wavelength on the matter, to identify similarities and differences with other migrant populations, and to set forth constructive solutions, for example for the recognition and protection of the growing number of environmentally-displaced persons¹². After giving a rough sketch of the phenomenon of environment-induced human mobility (1.1.), this Chapter will therefore propose a working definition for the purpose of this study (1.2.), as well as a classification of environment-induced population movements (1.3.).

1.1. Environment-induced population movements: facts and figures

1.1.1. Global environmental change as driver of migration

A range of major forces is expected to cause profound changes to our natural environment over the next decennia. Aside from global warming, examples include the loss of biodiversity, deforestation, land degradation, and natural hazards such as earthquakes and volcanic eruptions. Although the climate on earth has always fluctuated for natural reasons, the Intergovernmental Panel on Climate Change (IPCC) has indicated that over the past 100 years, the average surface temperature on earth

¹⁰ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf.

¹¹ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 2.

¹² D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 475.

has increased by 0.74 °C, which is an unusually rapid warming¹³. For the future, the IPCC projects a temperature increase of 1.1 to 6.4 °C by 2100, which would represent an increase unknown for the past 10.000 years¹⁴.

Although industrialised countries are most responsible for global warming, the developing countries will suffer the most. Their inhabitants are more vulnerable, because they live in fragile ecosystems, and do not have the technological and financial means to adapt to a severely degrading environment¹⁵. The more vulnerable people are, the less adaptive capacity they have, and in some cases they will therefore have no other option but to leave their environment.

Over the past decennia, many scientific reports and academic articles have highlighted the increasing influence of environmental changes on human mobility. In 2007, the fourth Global Environment Outlook of the United Nations Environment Programme (UNEP) noted that worldwide environmental degradation undermines development, human well-being and the achievement of some of the Millennium Development Goals, leading, *inter alia*, to human migration, in particular in drylands and small island developing states¹⁶. The same year, the IPCC described temporary rural-urban migration as a natural reaction to environmental hazards in its Fourth Assessment Report. According to the IPCC, extreme weather events could lead to large numbers of displaced people, and could eventually cause permanent migration as such events increase in the future¹⁷.

¹³ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007', Fourth Assessment Report, Synthesis report, Core Writing Team: Pachauri, R.K. and Reisinger, A. (eds.), Geneva, p. 30.

¹⁴ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007', Fourth Assessment Report, Synthesis report, Core Writing Team: Pachauri, R.K. and Reisinger, A. (eds.), Geneva, p. 45.

¹⁵ D.C. Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change', *23 Population and Environment* 5, 2002, p. 473; F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 8-9; E. Boon and T. Le Tra 'Are Environmental Refugees Refused?', *5 Stud. Tribes Tribals* 2, 2007, p. 91-92; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at: http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf, p. 28-29; S. Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate', *New Issues in Refugee Research*, UNHCR Working Paper No. 70, October 2002, available at: <http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf>, p. 10-11; J. McAdam, 'Climate Change 'Refugees' and International Law', NSW Bar Association, 24 October 2007, available at: <http://www.nswbar.asn.au/circulars/climatechange1.pdf>, p. 5.

¹⁶ United Nations Environment Programme (UNEP), Global Environment Outlook GEO4, *Environment for Development*, UNEP, Nairobi, p. 21-23.

¹⁷ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007', Fourth Assessment Report, Contribution of Working Group II on 'Impacts, Adaptation and Vulnerability', M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson (eds), Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

In 2011, a report commissioned by the UK Government Office for Science, the Foresight Report, examining global migration trends linked to environmental changes, confirmed most of the results which countless studies have been putting forward for many years¹⁸. Evidence from field-based research confirmed that environmental changes act as a driver for internal as well as international migration, specifically through their influence on a range of economic, social and political drivers which themselves affect migration. Some of the results of this study, which has seen the involvement of around 350 leading experts and stakeholders from 30 countries worldwide and is within the academic community regarded as scientifically robust, could be called “counterintuitive”¹⁹, such as the conclusion that people do not only migrate *away* from areas affected by environmental disruptions, but also move *towards* areas of high environmental risks, such as low-lying urban areas in mega-deltas or slums in flood prone cities. After all, regardless of environmental change, the powerful economic, political and social drivers of migration will stay in place. For instance, compared to 2000, there may be between 114 and 192 million additional people living in floodplains in urban areas in Africa and Asia by 2060, which will pose huge challenges to policymakers²⁰.

Furthermore, the Foresight Report acknowledges that environmental degradation can lead to “immobility” as well, as it often limits people’s capacity to move. As a decision to migrate requires a certain financial and social capital, people affected by environmental disruptions tend to have fewer possibilities to leave their environment. We could thus say that “environmental change is equally likely to make migration less possible as more probable”²¹. Foresight researchers therefore predict that in the future, millions of people will even be *unable* to move away from areas in which they are extremely vulnerable to environmental disasters. The Report identifies them as “trapped populations”, and refers for instance to small island states, where the population is already relatively poor, and as such often unable to respond to sea level rise by migrating, as people do simply not have the means to do so. In Somalia, drought-affected pastoralists, who normally migrate as a reaction to the degradation of their land, are now hindered to do so due to a long-lasting armed conflict. Similarly, in regions affected or threatened by sudden-onset natural hazards, it are mostly the wealthy which are able to migrate proactively, while the poor need to seek shelter in potentially

¹⁸ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011.

¹⁹ Professor Sir John Beddington, Chief Scientific Adviser to the UK Government, in his Foreword to the Foresight Report *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011.

²⁰ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 9.

²¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 9.

dangerous emergency shelters or remain in their homes, and are thus disproportionately affected²². When hurricane Katrina for example pounded in New Orleans in August 2005, the higher-class community left town, and criticism in the aftermath was fuelled by the government's response towards the lower-class community, causing deaths from thirst, exhaustion and violence in the Louisiana Superdome evacuation centre. Likewise, when cyclone Nargis hit in Burma in April 2008, the most vulnerable populations were unable to leave their environment, and were cut off from international humanitarian assistance²³. In a study like the present one on the effects of environmental changes on human mobility, we must therefore not forget these trapped populations, as they are just as important a policy concern as those who do leave their environment.

So in sum, the environment appears to influence human mobility in three ways:

- people move *away* from areas with high environmental risks
- people move *towards* areas with high environmental risks
- people stay “*immobile*”, or “*trapped*” in areas with high environmental risks.

Within the category that migrates, we can further differ between those who choose to migrate, and those which are forced to leave their environment (‘displaced persons’) in order to survive (see *further below in Section 1.3.2.3.*).

Important to stress though, is the fact that the relationship between environmental change and population movements is not straightforward. In Mali for example, the 1983–1985 droughts caused a decline of international migration, while short distance and circular migration increased, together with a significant increase in the migration of women and children²⁴. And in Ethiopia, researchers have found an increase of male labour migration as a reaction to periods of severe drought, while female marriage migration clearly decreased. This was because the degradation of the environment reduced poor household's capital for marriage and household formation²⁵.

²² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 13-16.

²³ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 119.

²⁴ S.E. Findley, ‘Does Drought Increase Migration? A Study of Migration from Rural Mali during the 1983-1985 Drought’, 28 *International Migration Review* 3, 1994, p. 539-553; Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 71.

²⁵ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 96.

Finally, based on the best available science and other evidence, another powerful conclusion of the Foresight Report is that the impact of environmental changes on human mobility will increase in the future, which requires a strategic policy approach at different levels, recognising the challenges and the opportunities of migration²⁶.

1.1.2. The environment as the sole driver of migration?

The concept of environment-induced migration naturally raises some questions as to whether the environment can easily be singled out as the sole driver of certain population movements. Obviously, a decision to migrate is affected by a complex interaction of push and pull factors. As mentioned above, environmental changes affect migration through their influence on an array of economic, social and political drivers of migration, which makes it often difficult, if not impossible, to clearly distinguish so-called “environmental migrants” from other migrant populations²⁷. Environmental disruptions have for example an impact on rural wages, agricultural prices and exposure to hazard, which in their turn indirectly affect population movements²⁸.

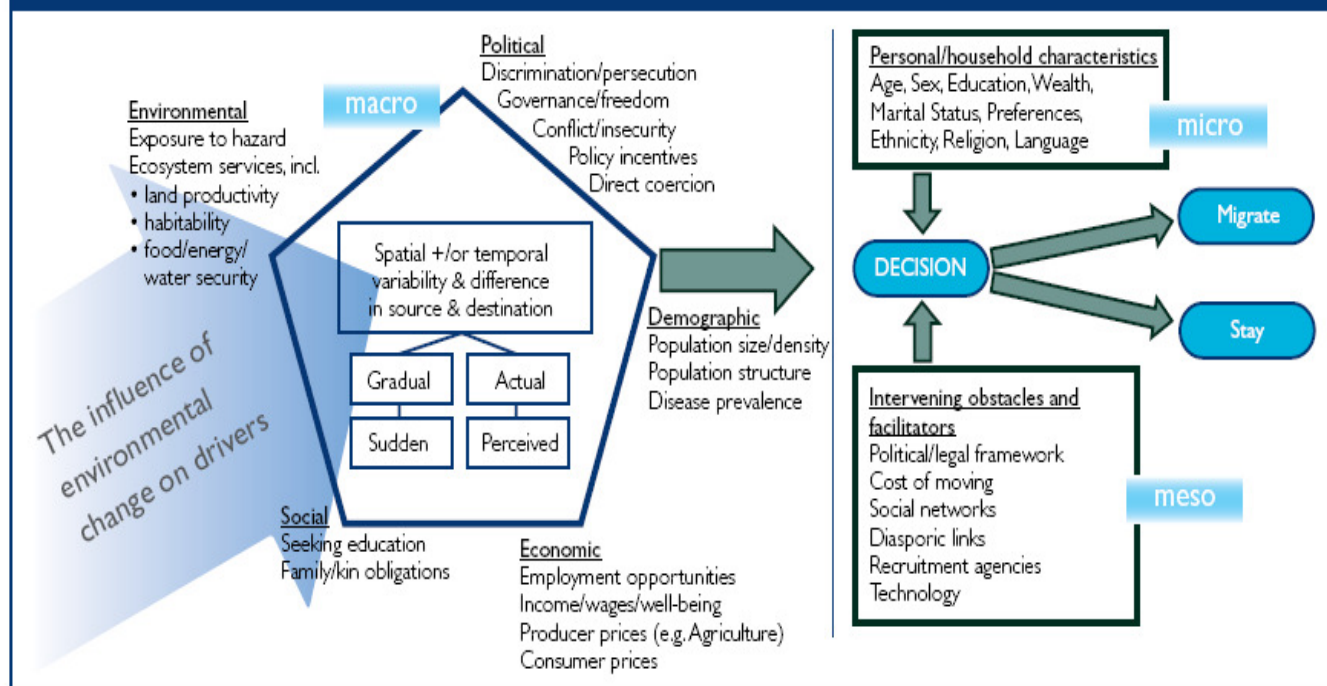
The figure²⁹ below outlines the complex multi-causality of environment-induced population movements.

²⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 9.

²⁷ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e6-e7; Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 9.

²⁸ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 11.

²⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 33.

Figure 1.3: Foresight's conceptual framework for the 'drivers' of migration

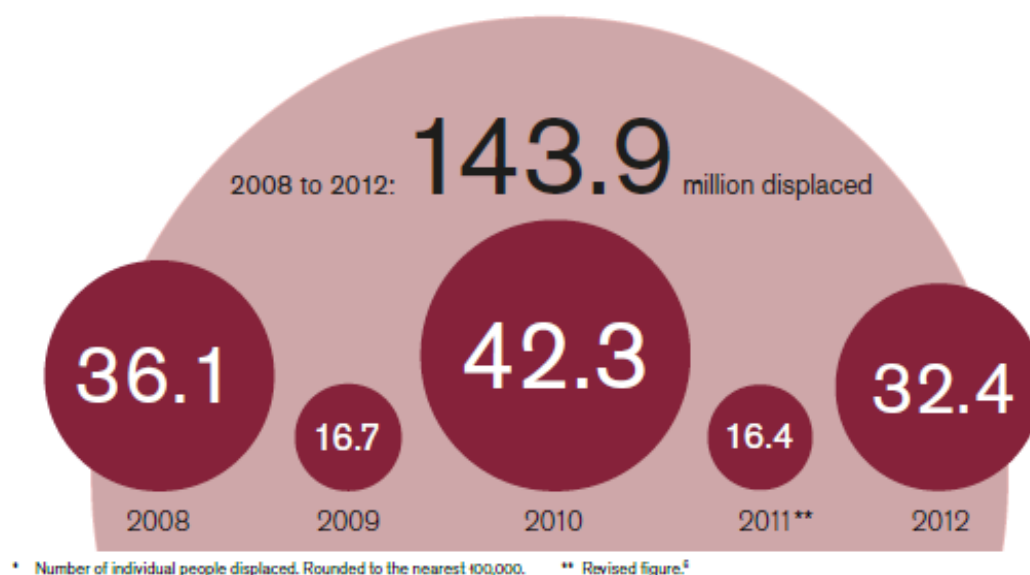
As indicated in this figure, a decision to migrate is also influenced by personal circumstances, as well as by a range of obstacles and facilitators, such as a legal framework allowing for or facilitating international movement.

However, aside from the indirect effects of environmental changes on human mobility, the environment can also directly affect people's decision to migrate. In case of sudden-onset natural disasters, such as earthquakes, volcanic eruptions, floods and hurricanes, it is indeed possible to single out the environmental disruption as the sole, or at least the main, cause of migration and displacement. Furthermore, it has been widely acknowledged and scientifically proven that global environmental changes influence national and international migration patterns, albeit through more complex interactions than a simple cause-and-effect relationship. This interaction between migration and environmental change clearly requires important changes in environmental and migration policies and legal frameworks, and thus truly deserves the academic attention given to this topic in this and other studies. The fact that migration is driven by a complex interaction of migration drivers, does not justify inaction at the political level to address the growing effects of environmental changes on national and international migration³⁰.

³⁰ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e7.

1.1.3. The game of numbers: predicting environment-induced movements

Environment-induced migration is not a myth, nor just a future threat, but it is already happening now. According to a yearly study of the Internal Displacement Monitoring Centre (IDMC), at least 32,4 million people were forced to flee worldwide due to natural hazard-induced disasters, in 2012 alone, which is almost twice as many as in 2011. About 98 % of disaster-induced displacement in 2012 was related to climate- and weather-related hazards. As can be seen in the figure³¹ below, the global estimate for each year since 2008 has varied significantly. This is mainly caused by differences in the scale and frequency of mega-disasters, which each displace millions of people. In 2010 for example, 15,2 million people were displaced by a severe flood in China³².



Over the past five years, Asia was the worst-affected continent, with 81 % of the global total of displaced persons, mainly in East, South and South-East Asia. In Africa, the majority of the 8,2 million displacements in 2012, which is a relatively high number for the region, was related to massive flood disasters across west and central Africa, with Nigeria as the worst-affected country, counting over 6

³¹ M. Yonetani, 'Global estimates 2012. People displaced by disasters', Report of the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), May 2013, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/99E6ED11BB84BB27C1257B6A0035FDC4/\\$file/global-estimates-2012-may2013.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/99E6ED11BB84BB27C1257B6A0035FDC4/$file/global-estimates-2012-may2013.pdf), p. 11.

³² M. Yonetani, 'Global estimates 2011. People displaced by natural-hazard induced disasters', Report of the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), June 2012, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/1280B6A95F452E9BC1257A22002DAC12/\\$file/global-estimates-2011-natural-disasters-jun2012.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/1280B6A95F452E9BC1257A22002DAC12/$file/global-estimates-2011-natural-disasters-jun2012.pdf), p. 4.

million displaced persons³³. Other studies have found that in Africa, about 10 million people were displaced over the last two decades, primarily because of environmental degradation and desertification³⁴.

Important to note is the fact that most studies on the current extent of environment-induced population movements only cover forced displacement instead of voluntary migration, and focus on sudden-onset disasters, instead of slow-onset environmental degradation. Indeed, it is easier to designate a certain movement as environment-induced in case of floods or hurricanes, than in case of drought or ecosystem degradation. Furthermore, the IDMC studies do not cover people living in protracted displacement situations³⁵, nor do they profile those populations which are “trapped” in a disaster-affected area.

As for the future, the most commonly quoted figure in the debate on environment-induced migration is that of 200 million persons displaced by the year 2050, as predicted by environmental scientist Norman Myers³⁶. However, the countless estimations for the future extent of this type of movement vary widely, both in general media as in academic reports. While Jacobson, in one of the first attempts to define ‘environmental refugees’, came to a figure of 10 million so-called “environmental refugees” (with more than half of them in sub-Saharan Africa)³⁷, Christian Aid consistently refers to a global number of 300 million environment-induced displaced persons

³³ M. Yonetani, ‘Global estimates 2012. People displaced by disasters’, Report of the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), May 2013, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/99E6ED11BB84BB27C1257B6A0035FDC4/\\$file/global-estimates-2012-may2013.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/99E6ED11BB84BB27C1257B6A0035FDC4/$file/global-estimates-2012-may2013.pdf), p. 27-28.

³⁴ Environmental Justice Foundation (EJF), *No Place like Home. Where next for climate refugees?*, A report by the Environmental Justice Foundation, London, 2009, available at: <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf>.

³⁵ M. Yonetani, ‘Global estimates 2011. People displaced by natural-hazard induced disasters’, Report of the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), June 2012, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/1280B6A95F452E9BC1257A22002DAC12/\\$file/global-estimates-2011-natural-disasters-jun2012.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/1280B6A95F452E9BC1257A22002DAC12/$file/global-estimates-2011-natural-disasters-jun2012.pdf), p. 7.

³⁶ N. Myers, ‘Environmental Refugees: a Growing Phenomenon of the 21st Century’, 357 *Philos Trans R Soc Lond B Biol Sci.* 1420, 2002, pp. 609-613; N. Myers, ‘Environmental Refugees: a Growing Phenomenon of the 21st Century’, Conference Paper for The Hague Conference on Environment, Security and Sustainable Development, The Hague, The Netherlands, 9-13 May 2004, available at: <http://www.envirosecurity.org/conference/working/EnvironmentalRefugees.pdf>; S. Castles, ‘Environmental Change and Forced Migration: Making Sense of the Debate’, New Issues in Refugee Research, UNHCR Working Paper No. 70, October 2002, available at: <http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf>, p. 1; J. McAdam, ‘Climate Change ‘Refugees’ and International Law’, NSW Bar Association, 24 October 2007, available at: <http://www.nswbar.asn.au/circulars/climatechange1.pdf>, p. 1.

³⁷ J.L. Jacobson, *Environmental Refugees: A Yardstick of Habitability*, Worldwatch Paper 86, Worldwatch Institute, Washington DC, 1988.

worldwide by 2050³⁸. The latter is based on the methodology used by Myers and Kent to come to their figure of 200 million displaced persons by 2050³⁹. However, using this same methodology, Stern adopted a prediction of 150-200 million displaced persons by 2050⁴⁰, while the Global Humanitarian Forum came to 78 million displaced persons by the year 2030⁴¹.

The use of these figures is questionable. Firstly, as indicated above, it is often difficult to single out the environment as the sole driver of population movements. The relationship between migration and environmental change is not linear, and is extremely difficult to predict. Forecasting the numbers of environment-induced migrants is also hampered by the lack of a clear consensus on a definition and classification of this type of movement, making it quite difficult to compare different reports and predictions⁴². Another reason why it is difficult to make estimations, is the fact that we have to distinguish between populations at risk and actual migrants. Often, the figures used in literature are based on the number of people living in a certain area at risk of an environmental disaster, disregarding the adaptive capacity of the community, as well as demographic changes⁴³. Furthermore, we have to take into account that it can also become more difficult to migrate due to a loss of resources⁴⁴. Moreover, the future impacts of environmental changes on human mobility depend for a large part upon climate change projections. As climate change could be mitigated through the reduction of greenhouse gas emissions, future population movements depend on today's climate policies. And naturally, if global warming would exceed the projected 2°C warming, as

³⁸ Christian Aid, 'Human Tide: The Real Migration Crisis', A Christian Aid Report, May 2007, available at: <http://www.christianaid.org.uk/images/human-tide.pdf>.

³⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 28. See N. Myers and J. Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena*, The Climate Institute, Washington DC, June 1995.

⁴⁰ N.H. Stern, *The Stern Review of the Economics of Climate Change*, Cambridge University Press, Cambridge, 2007.

⁴¹ Global Humanitarian Forum, *The Anatomy of a Silent Crisis*, Human Impact Report on Climate Change, Geneva, 2009.

⁴² F. Biermann and I. Boas, 'Global adaptation governance, the case of protecting climate refugees', in F. Biermann, P. Pattberg F. and Zelli (eds.), *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, 2010, p. 255-257; F. Gemenne, 'Why the numbers don't add up: A review of estimates and predictions of people displaced by environmental changes', *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 5-6.

⁴³ F. Gemenne, 'Why the numbers don't add up: A review of estimates and predictions of people displaced by environmental changes', *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 6.

⁴⁴ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 11; F. Biermann and I. Boas, 'Global adaptation governance, the case of protecting climate refugees', in F. Biermann, P. Pattberg F. and Zelli (eds.), *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, 2010, p. 255.

many scientists fear, current forecasts on the future extent of climate-induced migration will have to be adjusted⁴⁵. Finally, many of the estimates in academic literature are based on only one or two sources, which have in their turn been extensively criticised for their speculative nature⁴⁶.

Thus, several authors have argued against the use of estimates on the future extent of environment-induced migration and displacement, as they are “methodologically unsound”⁴⁷. In fact, the estimations of future numbers of environment-induced migrants have become one of the most controversial issues in this debate⁴⁸. Unfortunately the media appetite for false estimates regarding climate change remains large. In 2011, a prediction made by UNEP of 50 million “climate refugees” by 2010 was put to the light in an article in *The New Scientist*⁴⁹, invoking a lot of controversy in different blogs and internet websites⁵⁰. Aside from methodological shortcomings, it is also problematic that most existing forecasts are unnecessarily alarmist, in particular as regards increasing flows of ‘environmental refugees’ towards industrialised countries⁵¹. Most of the early

⁴⁵ F. Gemenne, ‘Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes’, *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 6-7.

⁴⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 27-28.; F. Gemenne, ‘Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes’, *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 1

⁴⁷ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 11. See for further criticism on the estimates: A. Suhrke, ‘Environmental Degradation and Population Flows’, 47 *Journal of International Affairs* 2, 1994, p. 478; R. Black, ‘Environmental refugees: myth or reality?’, *New Issues in Refugee Research*, UNHCR Working Paper No. 34, March 2001, available at: <http://www.unhcr.org/research/RESEARCH/3ae6a0d00.pdf>, p. 2-8; S. Castles, ‘Environmental Change and Forced Migration: Making Sense of the Debate’, *New Issues in Refugee Research*, UNHCR Working Paper No. 70, October 2002, available at: <http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf>, p. 2-3; V. Kolmannskog, *Future floods of refugees. A comment on climate change, conflict and forced migration*, Norwegian Refugee Council (NRC), April 2008, available at: http://www.nrc.no/arch/_img/9268480.pdf, p. 8-10.

⁴⁸ F. Gemenne, ‘Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes’, *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 1.

⁴⁹ F. Pearce, ‘Searching for the climate refugees’, *The New Scientist* nr. 2810, 27 April 2011.

⁵⁰ F. Gemenne, ‘Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes’, *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 4.

⁵¹ V. Kolmannskog, *Future floods of refugees. A comment on climate change, conflict and forced migration*, Norwegian Refugee Council (NRC), April 2008, available at: http://www.nrc.no/arch/_img/9268480.pdf, p. 9-10.

estimates have also been criticised for using forced migration to draw attention to environmental problems⁵².

Luckily, the international debate on environment-induced migration has during the past decades developed far beyond the numbers. Nonetheless, the use of figures certainly has some importance, for instance to bring the topic under the attention of policymakers, the media and the wider public. As Gemenne argues, “[t]he current interest for the topic is not only due to the specific nature of these migration flows, but also due to their potential magnitude”⁵³. So if we keep the above described methodological difficulties in mind, robust estimates can help to raise awareness on this issue. After all, it cannot be ignored that the majority of the predicted scenarios clearly agree on one general trend, which is the fact that the effects of environmental changes on human migration will increase in the future.

1.1.4. Cases of environment-induced population movements

In order to give more background to the relationship between migration and environmental change, some concrete examples of environment-induced population movements are discussed below. The examples are chosen to represent a variety of types of mobility, as well as a range of environmental drivers of migration, looking at the impact of environmental changes arising from climate change, as well as natural hazards, and ecosystem and land degradation. However, these cases do not aim to give a full overview of all kinds of environment-induced human mobility, nor do they represent the whole of possible drivers of environment-induced migration.

⁵² F. Gemenne, ‘Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes’, *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 2.

⁵³ F. Gemenne, ‘Why the numbers don’t add up: A review of estimates and predictions of people displaced by environmental changes’, *Global Environmental Change* 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/modelling/11-1188-mr7-why-the-numbers-dont-add-up-estimates-of-people-displaced.pdf>, p. 1.

1.1.4.1. The last days of Tuvalu

A. Drowning island states: Atlantis myth or reality?

As a result of global warming, the IPCC expects sea levels to rise by at least 18 to 59 cm by 2090-2099, relative to the period of 1980-1999⁵⁴, which will severely threaten low-lying island states like the Maldives in the Indian Ocean and Tuvalu and Kiribati in the South Pacific. Some island states are destined to disappear completely, leaving no internal relocation options for the inhabitants. The rising sea will also overflow heavily populated coasts and mega-deltas in South, East and South-East Asia and in Africa⁵⁵. Norman Myers estimated that sea level rise could lead to 26 million environmentally-displaced persons in Bangladesh alone⁵⁶. Even though the numbers of affected people at for instance the coastlines in Asia are much higher, the islanders of “drowning island states” have long been a symbol of so-called ‘climate refugees’ in the debate on environmental change and migration. According to Gemenne, they are even portrayed as the “canaries in the coalmine”, as small island states and their inhabitants are used to alert climate change-induced population movements worldwide⁵⁷.

⁵⁴ Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2007: The Physical Science Basis’, Contribution of Working Group I to the Fourth Assessment Report, Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.), Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

⁵⁵ Environmental Justice Foundation (EJF), *No Place like Home. Where next for climate refugees?*, A report by the Environmental Justice Foundation, London, 2009, available at: <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf>; Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2007: The Physical Science Basis’, Contribution of Working Group I to the Fourth Assessment Report, Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.), Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

⁵⁶ N. Myers, ‘Environmental Refugees: a Growing Phenomenon of the 21st Century’, Conference Paper for The Hague Conference on Environment, Security and Sustainable Development, The Hague, The Netherlands, 9-13 May 2004, available at: <http://www.envirosecurity.org/conference/working/EnvironmentalRefugees.pdf>.

⁵⁷ F. Gemenne, ‘Tuvalu, A Laboratory for Climate Change. Reflections on the Rethoric of the ‘Canaries in the Coalmine’’, Presentation at the Nansen Conference on Climate Change and Displacement in the 21st Century, Oslo, Norway, 6 June 2011, available at: [http://d2530919.hosted213.servetheworld.no/expose/global/download.asp?id=2237&fk=1596&thumb=](http://d2530919.hosted213.servetheworld.no/expose/global/download.asp?id=2237&fk=1596&thumb=;); F. Gemenne, ‘Environmental migration from small island states: why islanders should not be seen as ‘canaries in the coalmine’’, Presentation at the Conference on Climate Change Adaptation Futures: preparing for the unavoidable impacts of climate change, 29 June – 1 July 2010, Queensland, Australia, available at: <http://www.nccarf.edu.au/conference2010/wp-content/uploads/Francois-Gemenne1.pdf>.

The Pacific country Tuvalu, being “the most symbolic canary in the coalmine of climate change”⁵⁸ consists of 9 small coral islands in the South Pacific Ocean⁵⁹. With its 26 square kilometres of land, this former British colony is one of the smallest independent states in the world⁶⁰. The main economic activities of the inhabitants are fishing and farming⁶¹. Tuvalu is destined to become one of the first states to disappear due to the effects of global warming. As its highest point lies only 4,5 meters above sea level, the country is threatened by the rising ocean⁶². The density of water decreases as it becomes warmer, thereby increasing the volume of the ocean. This rise is further enlarged by the concomitant effects of the melting of glaciers and the ice caps⁶³. The melting of land-based glacier ice together with the thermal expansion of ocean water makes the sea level rise⁶⁴. In addition, Tuvalu is extremely vulnerable to cyclones, tsunami and drought⁶⁵. During the high tides in Tuvalu, waves coming from the ocean have a devastating effect on the islands. Furthermore, water from underground flows up through the coral ground of the islands⁶⁶. As a result of the rising sea level, Tuvalu is now in danger of disappearing beneath the waves.

B. Relocation of the population

The disappearance of a whole country raises some very interesting legal questions, not only regarding the rights of the inhabitants to move to other countries, but also concerning statehood and

⁵⁸ F. Gemenne, ‘Environmental migration from small island states: why islanders should not be seen as ‘canaries in the coalmine’, Presentation at the Conference on Climate Change Adaptation Futures: preparing for the unavoidable impacts of climate change, 29 June – 1 July 2010, Queensland, Australia, available at: <http://www.nccarf.edu.au/conference2010/wp-content/uploads/Francois-Gemenne1.pdf>.

⁵⁹ D. Goodwillie ‘Tuvalu’, 339 *New Internationalist*, 2002, p. 36; D. Shukman, ‘Tuvalu Struggles to Hold Back Tide’, *BBC News* 22 January 2008, available at: <http://news.bbc.co.uk/1/hi/sci/tech/7203313.stm>.

⁶⁰ Tuvalu was the Ellice part of the British colony of the Gilbert & Ellice Islands until 1976, and became independent in 1978, when it cut off the tie with the Gilbert Islands (now Kiribati).

⁶¹ D. Culley ‘Global Warming, Sea Level Rise and Tort’, 8 *Ocean & Coastal L.J.*, 2002, p. 92.

⁶² D. Shukman, ‘Tuvalu Struggles to Hold Back Tide’, *BBC News* 22 January 2008, available at: <http://news.bbc.co.uk/1/hi/sci/tech/7203313.stm>; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at: http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf, p. 14.

⁶³ Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2001: The Scientific Basis’, A Report of Working Group I of the Intergovernmental Panel on Climate Change, Summary for Policymakers 2001, prepared by D.L. Albritton et al., available at: http://www.grida.no/climate/ipcc%5Ftar/wg1/pdf/WG1_TAR-FRONT.PDF, p. 16.

⁶⁴ D. Culley ‘Global Warming, Sea Level Rise and Tort’, 8 *Ocean & Coastal L.J.*, 2002, p. 98-99.

⁶⁵ D. Goodwillie ‘Tuvalu’, 339 *New Internationalist*, 2002, p. 36; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at: http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf, p. 14-15.

⁶⁶ D. Shukman, ‘Tuvalu Struggles to Hold Back Tide’, *BBC News* 22 January 2008, available at: <http://news.bbc.co.uk/1/hi/sci/tech/7203313.stm>.

succession, international legal personality, statelessness of the inhabitants, law of the sea and rights to the territorial waters, and so on. Aside from the migration issue, these, purely academic, exercises are beyond the scope of this study. After all, these questions remain for the moment quite abstract, as empirical evidence shows that small island nations will be rendered uninhabitable, due to the impacts of climate change on their already fragile ecosystems, long before they would eventually disappear⁶⁷. Consequently, international legislation to protect stateless persons is not suited to give inhabitants of small island states the opportunity to emigrate⁶⁸.

First and foremost it is important to mention that the inhabitants of Tuvalu do not see themselves as 'climate *refugees*', as they do not want to be regarded as vulnerable victims of climate change⁶⁹. It is even argued that such a deterministic discourse might even hinder climate change mitigation actions, in order to prevent the islands from disappearing in the first place. However, since the people of Tuvalu realise they can no longer ignore the rising water, Tuvaluan officials have approached neighbouring countries to request assistance for a large-scale evacuation of the population⁷⁰. About 42 % of the 10.000 inhabitants of the island lives on Funafuti, the overcrowded capital island and only urban centre, leaving almost no internal relocation options⁷¹. As the Tuvaluan population cannot rely on an international regime for its resettlement, it currently only has the hospitality of its neighbours to depend upon.

Since 2002 New Zealand has a special immigration programme to accept immigrants from Tuvalu and other threatened Pacific islands. Under this Pacific Access Category (PAC) programme, which was actually based on an existing programme for Samoans, and replaced previous labour visa schemes for the population of Tuvalu, Kiribati and Tonga, New Zealand has issued quota of people that can migrate to the country each year. The programme is run by ballot. Whoever is drawn from the ballot after registering for it, can apply for residence. The current quota allow up to 75 citizens of Tuvalu, 75 citizens of Kiribati and 250 citizens of Tonga to be granted residence in New Zealand each year,

⁶⁷ H. Graeme, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Publishing, Oxford, 2010, p. 17-20; J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 119-120, 124.

⁶⁸ For further reasoning on the inapplicability of the law on statelessness: see J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 138-143; J. McAdam, 'Disappearing States', Statelessness and the Boundaries of International Law', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Publishing, Oxford, 2010, p. 105-129.

⁶⁹ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 120-121.

⁷⁰ D. Culley 'Global Warming, Sea Level Rise and Tort', 8 *Ocean & Coastal L.J.*, 2002, p. 106.

⁷¹ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 124-125.

together with their partners and dependent children⁷². Important to note though is that this migration scheme is classed as a labour migration programme instead of a resettlement scheme⁷³, and it was certainly not created with the aim of developing a protection regime for environmentally-displaced persons, as it was mistakenly perceived in different media as well as among academics⁷⁴. One of the criteria for residence is for example to be aged between 18 and 45 years old, and to have a job offer in New Zealand, meeting a minimum income requirement. However, it was decided to extend the programme to Tuvaluans after the Tuvaluan government's plea for immigration assistance to help their citizens to relocate. Although the quota only represent a small fraction of the number of people that would ultimately need to migrate from Tuvalu and other island states, the PAC programme does offer the islanders the opportunity to migrate proactively, instead of waiting for the rising tide to displace them⁷⁵.

1.1.4.2. The Katrina exodus in New Orleans

On the 29th of August 2005, Hurricane Katrina caused immense damage along the coasts of Louisiana, Mississippi and Alabama. It was one of the deadliest hurricanes that ever made landfall in the United States (US). The National Hurricane Center even found that it was the costliest natural disaster ever in the US, with a total damage estimated at 108 billion USD⁷⁶. In New Orleans, 80 % of the city was flooded as the levee system failed, causing the most significant number of deaths. Disaster relief in the immediate aftermath of the hurricane failed on several levels. Many evacuees did not receive sufficient shelter or medical assistance, and many suffered from hunger. The city became victim to violence and looting, causing several indirect casualties from violence, exhaustion or thirst.

⁷² Immigration New Zealand, Pacific Access Category Programme, available at:

<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>; J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 115.

⁷³ Environmental Justice Foundation (EJF), *No Place like Home. Where next for climate refugees?*, A report by the Environmental Justice Foundation, London, 2009, available at: <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf>.

⁷⁴ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 115.

⁷⁵ V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', 11 *European Journal of Migration and Law*, 2009, p. 325.

⁷⁶ R.R. Knabb, J.R. Rhome and D.P. Brown, 'Tropical Cyclone Report Hurricane Katrina, 23-30 August 2005', National Hurricane Center, 20 December 2005, available at: http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf, p. 13.

Migration patterns in the US Gulf Coast region in the wake of this natural disaster were the topic of various studies. Prior to the arrival of Hurricane Katrina, thousands of people had voluntarily left their homes, or had been forcibly evacuated to emergency shelters. However, many citizens decided to stay, and were trapped in their flooded houses when the levees eventually broke.

It has been found that Katrina redistributed more than 1 million people from the region elsewhere across the country⁷⁷. Almost the entire population of New Orleans has been displaced, and a large proportion of it will most likely never return⁷⁸. The population of cities such as Houston in Texas, Mobile in Alabama and Baton Rouge in Louisiana each increased with thousands of Katrina victims. Five months after Katrina's passage through New Orleans, about 200.000 people were again living in the city, which was less than half of the pre-Katrina population. The process of the repopulation of New Orleans even had important consequences for the demographic characteristics of its population. As black residents, who suffered more severe housing damage, returned to their homes at a much slower pace than white residents, it was feared that the city would become whiter and wealthier, at the expense of the poorer population⁷⁹.

Hurricane Katrina did not only illustrate that even in an industrialised country such as the US, natural hazards can displace large amounts of people, but it also showed that social inequality within communities influences people's vulnerability to environmental disasters⁸⁰. Social scientists have found a disproportionate displacement of low-income African American residents in New Orleans. Similarly, areas with a greater proportion of disadvantaged or marginalized populations, such as female-headed households, elderly, racial minorities, or poor families, and more densely built areas experienced more out-migration⁸¹. Clearly, the resilience of higher-income communities to the effects of sudden-onset natural disasters is higher than that of lower-income communities. Finally, the Katrina disaster also illustrates that a large number of people are now, more than ever, vulnerable to environmental disasters, not only due to an increase of natural hazards, but in part due

⁷⁷ B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Env'tl. L.J.*, 2007, p. 68-69.

⁷⁸ A. Oliver-Smith, 'Disasters and forced migration in the 21st century', Understanding Katrina: Perspectives from the social sciences, Social Science Research Council, published on 11 June 2006, available at: <http://understandingkatrina.ssrc.org/Oliver-Smith/>.

⁷⁹ E. Fussel, N. Sastry and M. Vanlandingham, 'Race, socioeconomic status, and return migration to New Orleans after Hurricane Katrina', 31 *Population and Environment* 1-3, 2010, p. 20-42.

⁸⁰ A. Oliver-Smith, 'Disasters and forced migration in the 21st century', Understanding Katrina: Perspectives from the social sciences, Social Science Research Council, published on 11 June 2006, available at: <http://understandingkatrina.ssrc.org/Oliver-Smith/>; A.C. Myers; T. Slack and J. Singelmann, 'Social vulnerability and migration in the wake of disaster: the case of Hurricanes Katrina and Rita', 29 *Population and Environment* 6, 2008, p. 271-291.

⁸¹ A.C. Myers; T. Slack and J. Singelmann, 'Social vulnerability and migration in the wake of disaster: the case of Hurricanes Katrina and Rita', 29 *Population and Environment* 6, 2008, p. 274, 286.

to their location in vulnerable areas. As the wetlands of southern Louisiana had been filled in the past, there was no natural protection buffer left, leaving the city even more vulnerable to the excesses of natural hazards⁸². In this sense, it is important to note that nature conservation measures can in fact help to prevent environment-induced population movements.

1.1.4.3. Droughts and ecosystem degradation in Niger

Aside from an overspill of water, the phenomenon of global warming will also lead to more severe droughts and desertification in many regions of the world. Drylands are now exposed to the effects of both climate change and land degradation resulting from erosion, salinisation or a decline in soil nutrients, reducing the productivity and reliability of agricultural and pastoral systems⁸³. According to the IPCC, in 2020, 74 to 250 million people will be affected by increased water shortages in Asia and Africa⁸⁴. Severe droughts will also affect human mobility in South America and the Middle East⁸⁵. In northeast Brazil for instance, periodic droughts contributed to the emigration of about 3,4 million people between 1960 and 1980⁸⁶. In Burkina Faso on the other hand, about 4.000 people affected by a major drought in the early 1970s responded by short-term rural-rural migration in order to diversify their income. As an estimated 90 % of the world's dryland populations live in low-income countries, they often have a lower adaptive capacity to environmental changes⁸⁷.

⁸² A. Oliver-Smith, 'Disasters and forced migration in the 21st century', Understanding Katrina: Perspectives from the social sciences, Social Science Research Council, published on 11 June 2006, available at: <http://understandingkatrina.ssrc.org/Oliver-Smith/>.

⁸³ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 68.

⁸⁴ Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2007: The Physical Science Basis', Contribution of Working Group I to the Fourth Assessment Report, Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.), Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

⁸⁵ E. Piguet, A. Pécoud, and P. De Guchteneire, 'Migration and Climate Change: an Overview', Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. 6.

⁸⁶ M. Leighton, 'Desertification and Migration', in P.M. Johnson, K. Mayrand and M. Paquin, *Governing Global Desertification. Linking Environmental Degradation, Poverty and Participation*, Ashgate, Hampshire, 2006, p. 47.

⁸⁷ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 68.

Compared to sudden-onset natural hazards, a decrease of freshwater availability will lead to more progressive patterns of migration⁸⁸. Through its impact on household wealth and income, droughts are likely to lead to a rise of short term, rural-rural migration, in order to seek income diversification. In particular in the rural drylands of Africa, migration of one or more members of the household is a vital livelihood strategy for many families. Furthermore, longer-distance migration often decreases in periods of drought, as this requires financial means. Long-term adverse effects on ecosystem services might give rise to rural-urban migration or to long-distance, longer-term, migration with the whole family, but it might also cause for people to be “trapped” in their degraded environment, or displace them when they have no other options than to flee their lands in order to survive⁸⁹.

In the Republic of Niger, seasonal migration has long been a traditional strategy to cope with temporal and geographical variability in dryland ecosystem services. With 65 % of the territory lying within the Sahara Desert, the population of about 14 million people mainly lives in semi-arid savannah, and in a narrow band of arable land in the south of the country. About 86 % of the Nigerien population lives in rural regions, with 90 % of the labour force earning an income through farming, cattle herding and fishing⁹⁰.

Niger is suffering from severe environmental disruptions, caused *inter alia* by droughts, soil degradation, deforestation and sand intrusion. In particular the shrinking of Lake Chad has catastrophic consequences for the population. The lake, which used to be shared by 4 countries – Cameroon, Niger, Nigeria and Chad –, was an important source of water for humans and livestock in the region. It provided even for one of the most productive regions for freshwater fish in Africa. However, frequent droughts have now put an end to this era. While the lake still covered about 25.000 km² in 1963, it decreased to 1.350 km² in 2008⁹¹. Today, Lake Chad has even disappeared completely in Niger.

The impact of those environmental problems on migration within and outside Niger has been the topic of a study conducted as part of the Environmental Change and Forced Migration Scenarios (EACH-FOR) research project, co-financed by the European Commission. Based on field research,

⁸⁸ E. Piguet, A. Pécoud, and P. De Guchteneire, ‘Migration and Climate Change: an Overview’, Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. 6.

⁸⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 71-74.

⁹⁰ T. Afifi, ‘Economic or Environmental Migration? The Push Factors in Niger’, 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e95-e96.

⁹¹ T. Afifi, ‘Economic or Environmental Migration? The Push Factors in Niger’, 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e103.

Tamer Afifi found that environmental degradation clearly has an impact on migration at the national and international level, mainly through its influence on the economic drivers of migration. In fact, he identifies those economic factors as “the mechanism through which the environmental damage influences migration”⁹².

Due to droughts and ecosystem degradation, traditional migration patterns in Niger have now changed. From the 1960’s on, people started moving with the changing shorelines of Lake Chad, thereby even crossing international borders. Working age males who used to migrate seasonally to coastal cities within the country, now tend to leave to further destinations in and outside the country, and migrate for longer periods, or even permanently, leaving women, children and elderly behind. According to Afifi, the push factors in the home region play a larger part in their migration decision, than the pull factors in destination areas, such as the capital Niamey or north African countries such as Libya⁹³.

1.1.4.4. Drainage of the marshes in Southern Iraq

In some cases, the natural environment of certain populations is intentionally destructed. In particular in times of war, environmental destruction is sometimes used in order to strategically relocate the enemy population⁹⁴. One of the most striking examples of the intentional destruction of the environment resulting in large-scale human displacement is the drainage of the marshes in Southern Iraq. Covering an area of about 20.000 square kilometres at the confluence of the Tigris and the Euphrates rivers, the marshes were inhabited by various tribes of Shia Muslims, known as the ‘Marsh Arabs’, for over 5.000 years⁹⁵. These tribes were depending on the marshes for their

⁹² T. Afifi, ‘Economic or Environmental Migration? The Push Factors in Niger’, 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e95.

⁹³ T. Afifi, ‘Economic or Environmental Migration? The Push Factors in Niger’, 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. E103, 116-117.

⁹⁴ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 472; J. Hong, ‘Refugees of the 21st Century: Environmental Injustice’, 10 *Cornell J.L. & Pub. Pol’y* 323, 2001, p. 335-336; D. Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 213.

⁹⁵ Human Rights Watch, ‘The Iraqi Government Assault on the Marsh Arabs’, A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 5; A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007,

subsistence⁹⁶. For decades, Shia Muslims across the country had been violently persecuted by Saddam Hussein's government. Besides the fact that they are Shia, the Marsh Arabs were specifically targeted for their taking part in the 1991 uprising against the government, and because the area provided refuge for political opponents of Saddam Hussein's regime⁹⁷.

The systematic draining of the marshes contributed to the widespread campaign against the Marsh Arabs⁹⁸. In 1991, after the First Gulf War, the Iraqi government aggressively constructed a water diversion project to divert the flow of the Tigris and Euphrates rivers away from the Marshes, in order to dry the land and eliminate the food source of the inhabitants. Through the construction of dams, dikes and canals, the government prevented water from reaching two-thirds of the marshlands⁹⁹. Consequently, by 2000, the Middle East's largest wetland ecosystem was systematically converted into a desert, forcing the Marsh Arabs to migrate¹⁰⁰.

The destruction of the Marshlands has displaced an estimated 350.000 to 500.000 Marsh Arabs, approximately 40.000 of whom have fled to Iran. The rest were internally displaced within Iraq¹⁰¹. The 5.000 year-old way of life of the Marsh Arabs has been destroyed in only a decade, and it will take much longer to restore the ecosystem than it took to destroy it¹⁰². In its 2001 Report, UNEP even considered the victims to be "environmental refugees"¹⁰³. Whether or not the Marsh Arabs which

p. 384; T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Envtl. L. Rev.* 697, 2005, p. 715.

⁹⁶ Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 5-6.

⁹⁷ Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 1; T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Envtl. L. Rev.* 697, 2005, p. 715.

⁹⁸ Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 2.

⁹⁹ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 385; T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Envtl. L. Rev.* 697, 2005, p. 715; Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 13.

¹⁰⁰ Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 4-5; T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Envtl. L. Rev.* 697, 2005, p. 716. For a more detailed overview of the environmental impacts, see: United Nations Environment Programme (UNEP), 'The Mesopotamian Marshlands: Demise of an Ecosystem', Early Warning and Assessment Technical Report UNEP/DEWA/TR.01-3 Rev. 1, 2001, p. 29-33.

¹⁰¹ United Nations Environment Programme (UNEP), 'The Mesopotamian Marshlands: Demise of an Ecosystem', Early Warning and Assessment Technical Report UNEP/DEWA/TR.01-3 Rev. 1, 2001, p. 39.

¹⁰² T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Envtl. L. Rev.* 697, 2005, p. 716.

¹⁰³ United Nations Environment Programme (UNEP), 'The Mesopotamian Marshlands: Demise of an Ecosystem', Early Warning and Assessment Technical Report UNEP/DEWA/TR.01-3 Rev. 1, 2001, p. 34.

were forced to migrate due to the loss of subsistence in the marshlands, can be recognised as refugees under international law, will be discussed further below (see *Section 1.2.1.*).

1.1.4.5. The lost city of Chernobyl

The nuclear incident in Chernobyl in the former Soviet Union is one of the most infamous examples of a technological disaster causing large-scale human displacement. In the morning of the 26th April 1986 the fourth reactor at the nuclear power plant in Chernobyl exploded, and released large amounts of radiation into the environment. Thirty people died in the explosion, but most casualties were attributed to the fallout after the accident. Even though the Soviet authorities were fully aware of the scope of the catastrophe, they delayed the evacuation of the population for more than forty hours after the explosion, thereby increasing the number of fatalities through radiation burns. In the critical hours after the accident, they even failed to report the event to the outside world.

Thousands of people in the 30 kilometre zone around the power plant were exposed to high radioactivity levels before being evacuated¹⁰⁴. Eventually, up to 100.000 persons were evacuated. As radioactivity needs 50.000 years to decontaminate, the thirty kilometre zone around Chernobyl will forever remain uninhabitable¹⁰⁵. Although the explosion was the result of technical failures in the reactor of the plant, the disaster reached such a catastrophic scale due to external conditions. The government's initial inaction and its failure to evacuate the population added to the seriousness of the disaster¹⁰⁶. Furthermore, due to pressure of the Soviet authorities, the fourth reactor of the Chernobyl plant was put into operation ahead of schedule, prior to the completion of sufficient safety tests. The government was not concerned with the long-term stability of the environment¹⁰⁷. Both this action and negligence of the Soviet government contributed to the gravity of the nuclear disaster at Chernobyl, and caused thousands of people to flee their environment indefinitely.

¹⁰⁴ J.B. Cooper, 'Environmental Refugees: meeting the Requirements of the Refugee Definition' 6 *N.Y.U. Env'tl. L.J.* 480, 1998, p. 514-515.

¹⁰⁵ D. Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"', 16 *Georgetown International Environmental Law Review* 209, 2004, p. 212-213; B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Env'tl. L.J.*, 2007, p. 72; J.B. Cooper, 'Environmental Refugees: meeting the Requirements of the Refugee Definition' 6 *N.Y.U. Env'tl. L.J.* 480, 1998, p. 515-516.

¹⁰⁶ J.B. Cooper, 'Environmental Refugees: meeting the Requirements of the Refugee Definition' 6 *N.Y.U. Env'tl. L.J.* 480, 1998, p. 516.

¹⁰⁷ J.B. Cooper, 'Environmental Refugees: meeting the Requirements of the Refugee Definition' 6 *N.Y.U. Env'tl. L.J.* 480, 1998, p. 516-517.

1.2. Terminology and definitions

The cases of environment-induced population movements described in the previous Section demonstrate that a variety of origins and types of such movements exist. In order to facilitate the research and development of policy options on this topic, a relevant classification of environment-induced population movements should be developed here. However, the research on environment-induced human mobility is also hindered by a “lack of conceptual clarity”¹⁰⁸. A whole range of different terms and definitions are used variably in the international debate. Hence a clear conceptual framework, with a defined terminology, is required first, as this would enable researchers and policymakers to identify similarities and differences with other migrant populations, and to set forth constructive solutions for the different categories of environment-induced migrants¹⁰⁹. The next two sections will therefore propose a definition and a classification of environment-induced migrants, taking into account the origins and types of their movement. This definition and classification should not be regarded as the sole possible conceptualisation of the linkage between environmental changes and migration, but rather as a point of departure for further research and discussion on the development of relevant policy measures.

1.2.1. Refugees, migrants or displaced persons? Drowning in terminology

In academic articles as well as in general media, a wide series of terms are used to describe people migrating due to environmental disruptions, ranging from ‘environmental migrants’ or ‘environmentally-displaced persons’, over ‘ecological migrants’, to ‘climate’ or ‘environmental refugees’. There is at the international level no general agreement on which terms to use in the debate on the nexus between environmental changes and human mobility.

When the topic of environment-induced population movements received renewed attention in the 1980s and 1990s, most media as well as academic studies used the popular term “environmental” or

¹⁰⁸ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 2.

¹⁰⁹ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 475.

“climate refugees”¹¹⁰. However, from a legal point of view, this term is strongly disputed, and can even be regarded as a “legal misnomer”¹¹¹. After all, the international refugee definition, established in the 1951 Refugee Convention, does not include people fleeing environmental disruptions. The Refugee Convention defines a refugee as any person who

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country”¹¹².

As environmental ‘refugees’ do not flee from persecution, they do generally not fit within the international definition of a refugee, and are therefore not protected by the 1951 Refugee Convention. The requirement of a well-founded fear of persecution is difficult to meet for people fleeing their country of origin due to environmental changes. This requirement means that the individual not only needs to demonstrate a subjective fear, but that this fear must further be “supported by an objective situation”¹¹³, and that the acts that he or she fears “must rise to the level

¹¹⁰ The term “environmental refugee” was first used by the United Nations Environment Programme (UNEP) in 1985. E. El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme (UNEP), Nairobi, 1985. See also in: F. Renaud, J. Bogardi, O. Dun and K. Warner, ‘Control, Adapt or Flee: How to Face Environmental Migration?’, UNU Institute for Environment and Human Security (UNU-EHS), Bonn, 2007, available at: <http://www.each-for.eu/documents/RENAUD%202007%20Control,%20Adapt%20or%20Flee%20How%20to%20Face%20Environmental%20Migration%20UNU-EHS.pdf>; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf; N. Myers, ‘Environmental Refugees: a Growing Phenomenon of the 21st Century’, 357 *Philos Trans R Soc Lond B Biol Sci.* 1420, 2002, pp. 609-613; N. Myers, ‘Environmental Refugees: a Growing Phenomenon of the 21st Century’, Conference Paper for The Hague Conference on Environment, Security and Sustainable Development, The Hague, The Netherlands, 9-13 May 2004, available at: <http://www.envirosecurity.org/conference/working/EnvironmentalRefugees.pdf>; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at: http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf.

¹¹¹ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 388, 367-368; D. Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 215; German Advisory Council on Global Change (WBGU), *Climate Change as a Security Risk*, Earthscan, London, 2008, 271 p., available at: http://ccsl.iccip.net/wbgu_jg2007_engl.pdf, p. 117-118.

¹¹² Article 1(A)(2), Convention Relating to the Status of Refugees, adopted on 28 July 1951 in Geneva, entered into force on 22 April 1954, 189 *UNTS* 137 (hereafter: “1951 Refugee Convention”); Article 1(2), Protocol Relating to the Status of Refugees, adopted on 31 January 1967, entered into force on 4 October 1967, 606 *UNTS* 267 (hereafter: “1967 Refugee Protocol”).

¹¹³ United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited January 1992), para 37-38.

of persecution”¹¹⁴. Furthermore, in order for environmentally-displaced persons to be recognised as refugees, they must demonstrate that their fear is based on one of the grounds enumerated in the 1951 Refugee Convention, namely their race, religion, nationality, membership of a particular social group or political opinion. Moreover, the term ‘refugee’ is limited to persons crossing international borders, while most people fleeing environmental degradation currently stay within the borders of their own country (*see further under 1.3.2.1.*)¹¹⁵.

At the time of the adoption of the Refugee Convention in the aftermath of World War II, the authors disregarded the connection between environmental damage and forced displacement¹¹⁶. The UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status even explicitly rules out people fleeing natural disasters, “unless they also have well-founded fear of persecution for one of the reasons stated”¹¹⁷. Nonetheless, in some exceptional cases, people fleeing for environmental reasons could fit within the definition of a refugee. Deliberately inflicting environmental harm could certainly be considered as a possible form of persecution, even if the direct harm is inflicted on the environment instead of the individual¹¹⁸. If the environment is deliberately destroyed in order to hurt particular groups on account of their race, religion, nationality, membership of a particular social group or political opinion, or when the government systematically imposes the burdens of environmental decisions on members of such groups, the victims could claim refugee status, as they

¹¹⁴ C.M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colo. J. Int’l Env’tl. L. & Pol’y* 271, 2004, p. 278.

¹¹⁵ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf.

¹¹⁶ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 367; D. Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 215; G.S. McCue, ‘Environmental Refugees: Applying International Environmental Law to Involuntary Migration’, 6 *Geo.Int’l Env’tl. L. Rev.*, 1993, p. 153.

¹¹⁷ United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited January 1992), para 39; C.M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colo. J. Int’l Env’tl. L. & Pol’y* 271, 2004, p. 278 - 279.

¹¹⁸ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 378; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at: http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf, p. 30; C.M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colo. J. Int’l Env’tl. L. & Pol’y* 271, 2004, p. 273-274, 297.

are suffering persecution through environmental harm for one of the reasons enumerated in the 1951 Refugee Convention¹¹⁹.

According to Kozoll, an individual could claim refugee status by establishing himself as a member of a racial or ethnic group generally persecuted through environmental harm¹²⁰. As such, a member of the Marsh Arabs in Southern Iraq (*see above in Section 1.1.4.4.*) could for example claim that he or she has a well-founded fear of persecution because his or her entire group was targeted by the Iraqi government through the drainage of the marshes. As already discussed above, the drainage was part of a widespread and systematic attack against the Marsh Arabs. Mass arrests, disappearances, torture and execution of political opponents were accompanied by the ecologically catastrophic drainage of the marshlands, which led to the large-scale forced displacement of the population¹²¹. Saddam Hussein's regime clearly had the specific intent to destroy the Marsh Arabs¹²². The entire group was persecuted through environmental harm on account of their religion, ethnicity and political opinion¹²³. The estimated 40.000 Marsh Arabs which have crossed the border with Iran, should thus be considered as refugees falling under the 1951 Refugee Convention.

An evaluation of the requirement of a "well-founded fear" must take the personality of the applicant into account¹²⁴. This would mean that a person with a strong relationship to the natural environment has "a better claim that environmental destruction amounts to persecution"¹²⁵. Indigenous groups which rely strongly on their environment stand therefore more chance of successfully claiming refugee status based on persecution through environmental harm.

¹¹⁹ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 384, 386; C.M. Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status', 15 *Colo. J. Int'l Env'tl. L. & Pol'y* 271, 2004, p. 273.

¹²⁰ C.M. Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status', 15 *Colo. J. Int'l Env'tl. L. & Pol'y* 271, 2004, p. 286.

¹²¹ Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 1.

¹²² T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Env'tl. L. Rev.* 697, 2005, p. 718.

¹²³ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 385; T. Weinstein 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' 17 *Geo. Int'l Env'tl. L. Rev.* 697, 2005, p. 718-719; Human Rights Watch, 'The Iraqi Government Assault on the Marsh Arabs', A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/backgrounder/mena/marsharabs1.pdf>, p. 4.

¹²⁴ United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited January 1992), para 40; J.-F. Mercure, 'À la Recherche d'un Statut Juridique Pour les Migrants Environnementaux Transfrontaliers : La Problématique de la Notion de Réfugié', 37 *Revue de Droit Université de Sherbrooke* 1, 2006, p. 14.

¹²⁵ C.M. Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status', 15 *Colo. J. Int'l Env'tl. L. & Pol'y* 271, 2004, p. 280.

Another important issue in the evaluation of the refugee status concerns the agent of the persecution, as persecution is usually an act of a government. However, as there is no per se requirement of active governmental persecution, non-state actors may also engage in actions amounting to persecution, provided that there is at least some state involvement. Non-state actions might qualify as persecution “if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”¹²⁶. As a result, environmentally-displaced persons could claim refugee status under certain circumstances, even if the government did not actively cause the environmental harm. If for example a private company intentionally harms the environment with the government’s tacit approval, this could be regarded as persecution¹²⁷.

Obviously, environmental harm is not always caused by human activities. If the environmental disruption is not man-made, it seems at first sight impossible to argue that those fleeing the situation are fleeing persecution¹²⁸. However, persecution can not only be directly inflicted by the government, but also indirectly by a lack of governmental protection. The lack of protection in case of a natural disaster might thus also be considered as persecutory “if, and only if, the persecutory intent on the part of the governmental entity may be established”¹²⁹. Moreover, the applicant must prove that he or she is persecuted for one of the reasons enumerated in the 1951 Refugee Convention.

Jessica Cooper goes one step further by arguing that both slow-set environmental degradation due to climate change and sudden-onset natural disasters should be recognised as persecution in the meaning of the Refugee Convention. By emphasising that governments are involved in most environmental crises, she tries to demonstrate that environmentally-displaced persons are already incorporated in the 1951 Refugee Convention. According to her theory, both the victims of the nuclear accident in Chernobyl and people displaced by sea level rise in Tuvalu could thus claim refugee status. Cooper alleges that the Chernobyl disaster is an example of governmental inaction leading to “environmental refugees”. Since the action and inaction of the Soviet government

¹²⁶ United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited January 1992), para 65; C.M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colo. J. Int’l Envtl. L. & Pol’y* 271, 2004, p. 284-285, 305.

¹²⁷ C.M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colo. J. Int’l Envtl. L. & Pol’y* 271, 2004, p. 284-285.

¹²⁸ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 378; C.M. Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’, 15 *Colo. J. Int’l Envtl. L. & Pol’y* 271, 2004, p. 273.

¹²⁹ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 381.

contributed for a large part to the gravity of the explosion of the power plant, the persons displaced by it were fleeing a government “that first harmed them and then failed to help them”¹³⁰. Even slow-onset environmental degradation caused by climate change would, according to Cooper, fulfil the ‘persecution’ requirement, as governments show a lack of commitment to reduce their emissions of greenhouse gases. People fleeing degrading environments would actually be fleeing the ‘persecution’ of their government¹³¹. In order to meet the requirement of persecution for a particular reason, Cooper argues that environmentally-displaced persons are persecuted for reasons of their membership of a particular social group, namely the group of persons who are politically powerless to protect their environment¹³². This would mean that the 1951 Refugee Convention would cover all environmentally-displaced persons, whether they are victims of an intentional destruction of the environment, environmental degradation due to climate change, or natural hazards. People fleeing environmental disruptions would form a concrete social group that suffers persecution due to its lack of political power to protect its environment¹³³. After all, as the inhabitants of developing countries lack the political power to force the international community to take measures against global warming, they will be continuously exposed to environmental degradation¹³⁴.

In my opinion, Cooper goes way too far when arguing that all categories of environmental degradation could be regarded as a form of governmental persecution. Her theory is unconvincing, as it ignores further requirements of the refugee definition for the governmental action or negligence to be persecutory in the meaning of the 1951 Refugee Convention¹³⁵. Environmental disasters generally affect people indiscriminately, without regard to race, religion, nationality or political opinion¹³⁶. Furthermore, a ‘social group’ must be defined independently from the

¹³⁰ J.B. Cooper, ‘Environmental Refugees: meeting the Requirements of the Refugee Definition’ 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 514, 517-519.

¹³¹ J.B. Cooper, ‘Environmental Refugees: meeting the Requirements of the Refugee Definition’ 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 508-513.

¹³² J.B. Cooper, ‘Environmental Refugees: meeting the Requirements of the Refugee Definition’ 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 521-526.

¹³³ J.B. Cooper, ‘Environmental Refugees: meeting the Requirements of the Refugee Definition’ 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 522; J.-F. Mercure, ‘À la Recherche d'un Statut Juridique Pour les Migrants Environnementaux Transfrontaliers : La Problématique de la Notion de Réfugié’, 37 *Revue de Droit Université de Sherbrooke* 1, 2006, p. 28-30.

¹³⁴ J.B. Cooper, ‘Environmental Refugees: meeting the Requirements of the Refugee Definition’ 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 525-526.

¹³⁵ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 379-380

¹³⁶ D.Z. Falstrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’, 13 *Colo. J. Int'l Envtl. L. & Pol'y* 1, 2001, p. 15; A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 381-382. Kozoll however argues that even natural disasters can give rise to persecution, namely when the government’s policy represents a deliberate attempt to refuse aid to the victims of a natural disaster, and in doing so targets one

persecution at issue¹³⁷. However, the social group of persons lacking the political power to protect their environment is defined by nothing more than the harm they suffer from¹³⁸. Political weakness is not an immutable characteristic that makes people part of a particular social group¹³⁹. Although the burden of natural disasters often falls most heavily on the poorest, we cannot argue that, for this reason, 'the poorest' constitute a 'social group' within the meaning of the 1951 Refugee Convention. Unless environmentally-displaced persons are associated by other facts than merely the environmental harm they suffer, they do not constitute a 'social group'¹⁴⁰. Finally, Cooper's argument would not bring all victims of environmental disruptions under the refugee definition, because not all of them can be considered as politically powerless¹⁴¹.

Even though the Refugee Convention is a product of the war-ravaged Europe of 1951 and the causes of forced displacement have changed ever since, the majority of scholars argue that the 1951 Refugee Convention cannot be reasonably interpreted to include "environmental refugees"¹⁴². While indeed some of the world's environmentally-displaced persons already fall under the refugee definition of the 1951 Refugee Convention, in general, people fleeing their home country because the environment no longer supports their survival, are not entitled to the international protection available to recognised refugees.

Being recognised as a refugee implies that one is entitled to international protection. In particular the right to *non-refoulement*, contained in Article 33 of the 1951 Refugee Convention, is one of the

particular group based on the listed reasons. See C.M. Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status', 15 *Colo. J. Int'l Env'tl. L. & Pol'y* 271, 2004, p. 274. Important to note though is that not all acts of discrimination based on race, religion, nationality, political opinion or membership of a particular social group amount to persecution. Discrimination will only constitute persecution if "it lead(s) to consequences of a substantially prejudicial nature for the person concerned". See United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited January 1992), para 54-55.

¹³⁷ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 382; D.Z. Falstrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment', 13 *Colo. J. Int'l Env'tl. L. & Pol'y* 1, 2001, p. 14.

¹³⁸ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 382.

¹³⁹ D.Z. Falstrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment', 13 *Colo. J. Int'l Env'tl. L. & Pol'y* 1, 2001, p. 14.

¹⁴⁰ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 383.

¹⁴¹ D.Z. Falstrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment', 13 *Colo. J. Int'l Env'tl. L. & Pol'y* 1, 2001, p. 14-15.

¹⁴² A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 368; S.B. Masters, 'Environmentally Induced Migration: Beyond a Culture of Reaction', 14 *Geo. Immigr. L.J.*, 2000, p. 866; G.S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', 6 *Geo.Int'l Env'tl. L. Rev.*, 1993, p. 170-173.

greatest benefits for refugees¹⁴³. They have the right not to be sent back to territories where their life or freedom is at risk. Just like conventional refugees, persons fleeing their country for environmental reasons often face life-threatening circumstances if they would be forced to return home. Some authors have therefore argued for an expansion of the 1951 refugee definition in order to include “environmental refugees”. They argue that environmentally-displaced persons are, similar to conventional refugees, forcibly displaced persons who are unable to return, and should therefore be entitled to equal international protection. However, the majority of scholars agree that such an expansion of the Refugee Convention is not the most suited option. Environmentally-displaced persons have other needs for protection than refugees persecuted by their government¹⁴⁴. While the bond of refugees with their government is severed, governments of countries affected by environmental degradation could cooperate with the international community in order to find durable solutions for their inhabitants. Furthermore, re-opening negotiations on the Refugee Convention could even undermine refugee protection, due to the reluctance of host countries to accept additional refugees¹⁴⁵. Finally, adapting the international refugee definition is not a realistic option. There is considerable political resistance to the expansion of the international refugee regime to environmentally-displaced persons. Various reports predict that environmentally-displaced persons will outnumber traditional refugees in the future. As of January 2011, there were about 9.800.860 million refugees worldwide¹⁴⁶, while the most commonly quoted figure for environment-induced population movements is that of 200 million displaced persons by the year 2050. It is not

¹⁴³ Article 33 of the 1951 Refugee Convention: “1. No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

¹⁴⁴ Environmental Justice Foundation (EJF), *No Place like Home. Where next for climate refugees?*, A report by the Environmental Justice Foundation, London, 2009, available at: <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf>; A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 508.

¹⁴⁵ Environmental Justice Foundation (EJF), *No Place like Home. Where next for climate refugees?*, A report by the Environmental Justice Foundation, London, 2009, available at: <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf>; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 314; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf; A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 509; J.B. Cooper, ‘Environmental Refugees: meeting the Requirements of the Refugee Definition’ 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 499-502.

¹⁴⁶ UNHCR, Global appeal 2013 – Populations of concern to UNHCR, update, available at: <http://www.unhcr.org/50a9f81b27.html>.

realistic to bring this large group of environmentally-displaced persons under the same protection regime as refugees, as this would render the whole international refugee regime overloaded, and thus ineffective¹⁴⁷.

However, as environment-induced population movements are increasing, national assistance will often prove to be insufficient. States can be unable or unwilling to offer sufficient protection in the form of emergency relief and/or relocation assistance. Therefore, we need to study how to protect people displaced for environmental reasons with no other option than to flee in order to survive, through other mechanisms than the refugee regime (*see further under Chapter III*).

As a result of the analysis above, the term “environmental refugee” is not the most appropriate term to describe people migrating due to changes in their environment. Therefore, some intergovernmental agencies, such as the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM) and the secretariat of the UNFCCC, prefer instead to use the terms ‘environmentally-displaced persons’ or ‘environmental migrants’¹⁴⁸. Others differentiate between environmental ‘refugees’ and environmental ‘migrants’, the former being people who are forced to flee, with immediate effect, while the latter migrate because of the gradual degradation of the environment, and have therefore more control over their migration¹⁴⁹. Nonetheless, some authors see no reason to reserve the term ‘refugee’ for persons defined by the 1951 Refugee Convention, and to invent less appropriate terms for individuals who are forced to leave their homes because of environmental degradation or destruction¹⁵⁰. According to Biermann and Boas, the use of the term ‘environmental refugee’ for those who are compelled to leave their

¹⁴⁷ D. Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 215-216.

¹⁴⁸ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 6-7; D. Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 215; A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 388.

¹⁴⁹ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 468-473; R. Black, ‘Environmental refugees: myth or reality?’, *New Issues in Refugee Research*, UNHCR Working Paper No. 34, March 2001, available at: <http://www.unhcr.org/research/RESEARCH/3ae6a0d00.pdf>, p. 13.

¹⁵⁰ F. Biermann and I. Boas, ‘Global adaptation governance, the case of protecting climate refugees’, in F. Biermann, P. Pattberg F. and Zelli (eds.), *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, 2010, p. 256-257; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 8.

habitat for environmental reasons would only require “some terminological adjustment” within the current international refugee regime, but would be legally and practically unproblematic¹⁵¹. After all, the 1951 Refugee Convention defines refugees only for the purpose of its own regime. They consider the denial of the moral status of a refugee disrespectful with regard to the victims of environmental disruptions¹⁵².

Although I consider this argument to be praiseworthy from a moral point of view, for the above-mentioned reasons I prefer not to use the term ‘environmental refugees’, but instead the term ‘environment-induced migrants and displaced persons’. More than the term ‘migrants’, the term ‘displaced persons’ refers, similar to the word ‘refugee’, to the element of flight and the need for international assistance¹⁵³. The term ‘migrant’ is used as an overarching concept, including forced migrants (‘displaced persons’) and voluntary migrants. Similarly, this study will also use the overarching term ‘human mobility’ to describe various kinds of population movements, ranging from migration to displacement, as well as planned relocation or resettlement.

1.2.2. Defining environment-induced migrants and displaced persons

Three decennia of research on the linkage between migration and environmental changes have delivered a multitude of definitions and descriptions of people on the move for environmental reasons. Due to the difficulty of differing between environmental and other drivers of migration and the confusion between forced and voluntary migration, there is currently no consensus among academics neither among policymakers and practitioners regarding definitions in this field. While the lack of a consensus on a definition of environment-induced migrants and displaced persons should not be used as an excuse for the inaction of policymakers, it is useful to develop a working definition here. According to Dun and Gemenne, the interest of a definition for academic purposes “lies in

¹⁵¹ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 27-28.

¹⁵² F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 8.

¹⁵³ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e12.

understanding the factors underlying migration decisions”¹⁵⁴. A definition can help to develop targeted policy options and to designate the appropriate legal frameworks to address the issue.

In 1985, UNEP researcher El-Hinnawi defined “environmental refugees” for the first time as

“those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardi[s]ed their existence and/or seriously affected the quality of their life”¹⁵⁵.

By ‘environmental disruption’ he meant “any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life”¹⁵⁶.

In the first decades after the emergence of environment-induced human mobility as a new research field, social scientists often preserved this definition without much criticism¹⁵⁷. However, this definition has several shortcomings. For instance, disregarding the complex interaction of the various drivers of migration, El-Hinnawi did not clarify whether or not, according to his definition, ‘environmental refugees’ are displaced *solely* due to the effects of an environmental disruption. Furthermore, his definition also includes those which are evacuated by their government in case of an environmental disaster, and receive sufficient shelter, temporarily or permanently. In order to facilitate the development of protection mechanisms for environmentally-displaced persons, I believe it is better, in line with the international refugee definition, to distinguish them from affected persons who do get sufficient protection. When for example a freight train carrying toxic chemicals derailed in Belgium in May 2013, around 1.000 people were evacuated by the government as the environment was severely polluted due to the release of toxic substances in the air. As the evacuees received sufficient shelter and other forms of assistance from local governmental authorities, they should not be regarded as ‘environmentally-displaced persons’.

The original definition of El-Hinnawi was adapted by several other academics¹⁵⁸. According to Myers for example, *environmental refugees* are “people who can no longer gain a secure livelihood in their

¹⁵⁴ O. Dun and F. Gemenne, ‘Defining ‘Environmental Migration’’, *Forced Migration Review* nr. 31, October 2008, p. 10.

¹⁵⁵ E. El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme (UNEP), Nairobi, 1985, p. 4.

¹⁵⁶ E. El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme (UNEP), Nairobi, 1985, p. 4.

¹⁵⁷ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 466.

¹⁵⁸ See for example D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 648; B. Docherty and T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, 33 *Harvard Environmental Law Review* 2, 2009, p. 367-372; R. Black, ‘Environmental refugees: myth or reality?’, *New Issues*

erstwhile homelands because of drought, soil erosion, desertification, and other environmental problems”¹⁵⁹, while Biermann and Boas define *climate refugees* as “people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of the three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity”¹⁶⁰. Most authors refer in their proposed definitions to the multi-causality of environment-induced population movements¹⁶¹, and refer to the environmental cause as well as the type of migration (temporary and permanent, internal and international, forced and voluntary migration). In my opinion, the term ‘environment-induced migration’ applies only where the environmental change is not only a contributing but also a major factor in the decision to migrate. Furthermore, while some authors limit their definition to *climate change*-induced movement, I choose to encompass both climate and other environmental causes of migration. After all, for the development of a protection mechanism or legal migration opportunities for affected communities, it does not make a difference whether or not the environmental changes affecting individuals and communities are caused by climate change.

Another often cited definition is the one proposed by the IOM, stating that:

“Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad”¹⁶².

Aside from being a very broad and inclusive description, the IOM’s definition is useful for considering both temporary and permanent movements, as well as for including both forced and voluntary migration. However, in order to better identify those who need international protection and fill the gap in legal protection mechanisms, I believe a separate working definition is needed for those which are forced to leave an environment which no longer supports their survival.

in *Refugee Research*, UNHCR Working Paper No. 34, March 2001, available at: <http://www.unhcr.org/research/RESEARCH/3ae6a0d00.pdf>.

¹⁵⁹ N. Myers, ‘Environmental Refugees in a Globally Warmed World’, 43 *Bioscience* 11, 1993, p. 752.

¹⁶⁰ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf.

¹⁶¹ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e13.

¹⁶² International Organisation for Migration (IOM), Discussion Note on ‘Migration and the Environment’, MC/INF/288, 1 November 2007, Ninety Fourth Session, Geneva, available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf, p. 1-2.

For the purpose of this study, the term ‘environment-induced migrant’ shall therefore apply to:

any person who is forced to leave his (former) habitual residence, or chooses to do so, mainly because of a marked environmental disruption (natural and/or triggered by people) that seriously affects the quality of his life, and who moves temporarily or permanently, either within his country or abroad.

Adapted from the El-Hinnawi’s conceptualisation as well as the IOM’s broad definition, this working definition serves as an overarching concept, including both forced and voluntary migrants. Consequently, the term “environmentally-displaced person” shall apply to:

any person who is forced to leave his (former) habitual residence, mainly because of a marked environmental disruption (natural and/or triggered by people) that jeopardises his existence and/or seriously affects the quality of his life, and is unable to avail himself of the protection of his home state due to the state’s unwillingness or inability to protect him.

This definition will cease to apply to any person who is able to return to his former habitual residence, because the environmental cause of the displacement has ceased to exist, or because he is able to re-avail himself of the protection of the country of his former habitual residence.

Finally, the term ‘environmentally motivated migrant’ is used to describe

any person who chooses to leave his (former) habitual residence, mainly because of a marked environmental disruption (natural and/or triggered by people) that affects the quality of his life, and who moves temporarily or permanently, either within his country or abroad.

As it is useful to further distinguish between various categories of environment-induced migrants and displaced persons in order to inform policymakers on the actions they need to undertake for each of these categories, the next Section will describe various types of environment-induced population movements, according to the origin as well as the type of movement.

1.3. Classification of environment-induced human mobility

1.3.1. According to the origin of the movement

A decision to migrate can be influenced by a broad array of ‘environmental drivers’, which are set out below. The most substantial distinction made here is the one between the gradual degradation of the environment, and the occurrence of sudden-onset environmental disruptions. This distinction is crucial for the elaboration of suited policy answers, as people affected by sudden-onset hazards will migrate differently, and thus have different needs, than people affected by the progressive deterioration of the environment¹⁶³.

1.3.1.1. Gradual environmental degradation

Individuals and communities who choose to migrate, or are obliged to do so, due to the gradual degradation of the environment, mainly caused by global warming and the loss of biodiversity, constitute the largest group of environment-induced migrants¹⁶⁴. Land and soil degradation, severe droughts and desertification, degradation of water resources, sea level rise, *etcetera*, lead to a progressive loss of ecosystem services and/or seriously affect people’s livelihood provision. Such processes can either manifest themselves rapid (but still different from sudden-onset hazards), such

¹⁶³ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e18.

¹⁶⁴ N. Myers, ‘Environmental Refugees’, 19 *Population and Environment* 2, 1997, p. 167-182; N. Myers, ‘Environmental Refugees: a Growing Phenomenon of the 21st Century’, Conference Paper for The Hague Conference on Environment, Security and Sustainable Development, The Hague, The Netherlands, 9-13 May 2004, available at: <http://www.envirosecurity.org/conference/working/EnvironmentalRefugees.pdf>; D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 474; A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 504-506; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at: http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf, p. 14-19.

as land clearing for agricultural activities or soil degradation due to overgrazing, or much slower, for instance in case of desertification or sea level rise¹⁶⁵.

Although much, but not all, of these degradation processes are linked to human activities, a distinction can further be made between activities intended to degrade the environment, and the unintentional degradation of the environment. Subcategories of gradual environmental degradation are then:

- natural and human-induced (unintentional) processes of environmental degradation,
- activities where the environment is used for purposes incompatible with human habitation,
- activities where the environment is intentionally destroyed to displace the population.

The first subcategory is far and foremost the most extensive one. Besides climate change and the consequences of an increasing global population consuming ever more natural resources, it encompasses, among others, land degradation as a result of erosion, salinisation or a decline in soil nutrients, caused for instance by clearance for firewood or the overgrazing of pastureland¹⁶⁶. The phenomenon of global warming will lead among others to sea level rise and severe desertification, threatening to force more than 200 million people to leave their environment¹⁶⁷. Myers estimated for example that sea level rise could put 26 million people at risk of environment-induced displacement by 2050 in Bangladesh alone¹⁶⁸. Furthermore, changes in temperatures and rainfall patterns will also lead to large-scale human mobility. In the Sahel region for example, where rural populations depend heavily on rain-fed agriculture and pastoralism, field-based research has showed an increase in short term, rural-rural migration, as well as a reduction of longer-distance migration, requiring economic assets¹⁶⁹. The above discussed examples of the “sinking” island nation Tuvalu and the shrinking of Lake Chad in Niger both belong to this category.

Of course, where the environment is unintentionally destroyed by human activities, we could also say that people migrate due to the economic or social factors that lie at the ground of the

¹⁶⁵ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e20-e21.

¹⁶⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 68.

¹⁶⁷ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 474; A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 504-506.

¹⁶⁸ N. Myers, ‘Environmental Refugees’, 19 *Population and Environment* 2, 1997, p. 175.

¹⁶⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 71-72.

environmental degradation. However, when the environment is not only a contributing, but the major factor, directly or indirectly, in the decision to migrate, the affected migrating population is considered here as environment-induced migrants.

In some cases, the environment is used for purposes which are incompatible with the habitation or livelihood provision of the population, thereby forcing them to leave their traditional habitat¹⁷⁰. Examples include displacement due to large development projects, and migration due to environmental conservation projects or climate change adaptation and mitigation projects. The construction of the Three Gorges Dam in China, which displaced at least 850.000 people, is one of the most infamous examples¹⁷¹. In all of the case studies discussed above, the degradation of the natural environment causes humans to leave their region of origin. However, the protection of the environment itself, in order to prevent environmental degradation from happening, can also cause population movements. Considering the dependence of human beings on the natural environment, in some regions more than in others and some populations more than others due to their specific lifestyle, environmental protection contributes to the protection of the livelihoods of the population. However, the protection of the environment can also have a negative impact upon those livelihoods, for example in a situation where the conservation of the environment, in the form of designating areas as nature reserves, results in the expulsion of indigenous tribes from their land. When the government offers insufficient relocation assistance, these people can be considered as environmentally-displaced persons (*see further below in Chapter V, Section 2.2.1.*).

Finally, the environment is sometimes intentionally destroyed, in order to displace the population. As discussed above, the drainage of the Marshes in Southern Iraq led to the displacement of an estimated 350.000 to 500.000 Marsh Arabs, of which 40.000 had fled to Iran¹⁷². Intentional destruction of the environment often takes place in times of war, in order to affect the enemy population¹⁷³. Bates defines such “ecocide” as “the intentional destruction of human environments

¹⁷⁰ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 471-472.

¹⁷¹ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 472; E. Boon and T. Le Tra ‘Are Environmental Refugees Refused?’, 5 *Stud. Tribes Tribals* 2, 2007, p. 89; B. Havard, ‘Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law’ 18 *Villanova Env’tl. L.J.*, 2007, p. 71.

¹⁷² Human Rights Watch, ‘The Iraqi Government Assault on the Marsh Arabs’, A Human Rights Watch Briefing Paper, January 2003, available at: <http://www.hrw.org/background/mena/marsharabs1.pdf>, p. 5; A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 384; T. Weinstein ‘Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?’ 17 *Geo. Int’l Env’tl. L. Rev.* 697, 2005, p. 714-722.

¹⁷³ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 472; J. Hong, ‘Refugees of the 21st Century: Environmental Injustice’, 10 *Cornell J.L. & Pub. Pol’y* 323, 2001, p. 335-336; D. Keane, ‘The Environmental Causes and Consequences of

in order to strategically relocate a target population during a period of war”¹⁷⁴. The use of herbicides in the Vietnam War and the placement of land mines near wells and roads in the Kurdish region of Iraq during the Gulf War are examples of attempts to displace the enemy population by destroying their environment.

1.3.1.2. Sudden-onset environmental disruptions

Acute and rapid disruptions in the environment can cause human migration and displacement. Two subcategories can be distinguished, namely natural or climate change-induced hazards and technological accidents.

A. Natural or climate change-induced hazards

The category of natural or climate change-induced hazards encompasses weather or geological events, such as earthquakes, floods, hurricanes and volcanic eruptions, as well as landslides, tsunamis, coastal storm surges and so forth¹⁷⁵. They can render a place temporarily or permanently uninhabitable. These events are not necessarily of natural origin, as they can be triggered by social or economic factors, such as land use changes¹⁷⁶. Furthermore, climate change is expected to increase the magnitude and frequency of natural hazards in regions which are already particularly vulnerable

Migration: A Search for the Meaning of “Environmental Refugees”, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 213.

¹⁷⁴ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 472.

¹⁷⁵ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 471; G.S. McCue, ‘Environmental Refugees: Applying International Environmental Law to Involuntary Migration’, 6 *Geo.Int’l Env’tl. L. Rev.*, 1993, p. 160-161; B. Havard, ‘Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law’ 18 *Villanova Env’tl. L.J.*, 2007, p. 67-69; D. Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’, 16 *Georgetown International Environmental Law Review* 209, 2004, p. 211-212; F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e18.

¹⁷⁶ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e18.

to natural disasters¹⁷⁷. Moreover, disasters such as the 2004 tsunami in the Indian Ocean and the 2005 Katrina hurricane show that the seriousness of the effects of natural phenomena can partly be the result of biodiversity losses caused by human activities.

Whether or not a natural *hazard* actually becomes a natural *disaster* depends for a large part on the vulnerability of the population and its adaptive capacity, as well as the resilience of individual inhabitants. For instance early warning systems and alternative livelihood provision play a significant role. Furthermore, considering the population growth in vulnerable areas, the seriousness of the impact of a natural hazard is also linked to the increased exposure of affected populations¹⁷⁸.

A sudden-onset environmental hazard is likely to immediately dislocate individuals or whole communities, who, in most cases, have to flee in order to save their lives¹⁷⁹. The volcanic eruption on the Caribbean island of Montserrat in 1995 for example, forced 7.000 people to evacuate¹⁸⁰, and about 1,5 million persons were displaced in the aftermath of the Katrina hurricane of August 2005 in the United States¹⁸¹. One of the most devastating natural disasters of the last decennia is the tsunami of 26 December 2004 in the Indian Ocean, which displaced millions of people, among which 412.438 people in Banda Aceh (Indonesia) alone¹⁸². According to the Internal Displacement Monitoring Centre (IDMC), in the period 2008-2012, about 143,9 million people were newly displaced due to natural hazard-induced disasters. In 2012, about 98 % of disaster-induced displacement was related to climate- and weather-related hazards. The two largest disasters that year, namely flood disasters in North-East India and across almost all of Nigeria, accounted for 41 % of the global total of displaced

¹⁷⁷ J.B. Cooper, 'Environmental Refugees: meeting the Requirements of the Refugee Definition' 6 *N.Y.U. Envtl. L.J.* 480, 1998, p. 503; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 369-371; M. Conisbee and A. Simms, *Environmental Refugees: the Case for Recognition*, New Economics Foundation, NEF Pocketbook, 2003, available at:

http://dnwssx4l7gl7s.cloudfront.net/nefoundation/default/page/-/files/Environmental_Refugees.pdf, p. 14-15.

¹⁷⁸ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e18.

¹⁷⁹ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e18.

¹⁸⁰ D.C. Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change', 23 *Population and Environment* 5, 2002, p. 471.

¹⁸¹ B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Envtl. L.J.*, 2007, p. 69; F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e19.

¹⁸² United Nations Environment Programme (UNEP), 'After the Tsunami: Rapid Environmental Assessment', UNEP Report 2005, available at: http://www.unep.org/tsunami/reports/TSUNAMI_report_complete.pdf; E. Boon and T. Le Tra 'Are Environmental Refugees Refused?', 5 *Stud. Tribes Tribals* 2, 2007, p. 88; B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Envtl. L.J.*, 2007, p. 68.

persons. The table below¹⁸³ gives an overview of the top 20 of the largest natural disaster-induced displacement events in 2012.

	2012 Event	Location	Displaced	Date
1	India monsoons floods (1st period)	North-east: Assam state and Arunachal Pradesh state	6,900,000	June/July
2	Nigeria rainy season floods	33 out of 36 states, including the Federal Capital Territory	6,089,000	September/October
3	China Typhoon Haiwai floods	Coastal, northern and southern provinces	2,079,000	August
4	India monsoon floods (2nd period)	North-east : Assam and Arunachal Pradesh	2,000,000	August/September
5	Philippines Typhoon Pablo (Bopha)	Mindanao	1,932,000	December
6	Pakistan monsoon floods	Balochistan, Sindh, Punjab	1,857,000	August/September
7	Philippines floods - southwest monsoon and typhoon effects	Luzon, including Metro Manila. Parts of Visayas and Mindanao	1,553,000	June/August
8	China monsoon floods (2nd period)	12 provinces or areas of the east, central, south, south-west and north-west.	1,420,000	June/July
9	China Twin typhoons Saola and Damrey/ floods	10 provinces – north-east to south-east	867,000	August
10	USA Hurricane Sandy	East Coast, Appalachians, Mid-West	776,000	October
11	Bangladesh monsoon floods	South-east and north-east	600,000	June
12	China Typhoon Kai-Tak	East coast – Guangdong and Guangxi	530,000	August
13	Niger rainy season floods	Dosso (south-west), Tillabéri (west) and Niamey Region	530,000	July/August
14	Chad rainy season floods	N'Djamena, southern regions	500,000	July/October
15	China monsoon floods (1st period)	147 counties in 22 provinces, including Gansu, Hunan and Jiangxi provinces	443,000	April/May
16	Cuba Hurricane Sandy	East coast	343,000	October
17	South Sudan rainy season floods	44 out of 47 counties in Jonglei, Upper Nile and Unity states	340,000	June/July
18	Japan floods and landslides	Kyushu	250,000	July
19	DPRK (North Korea) monsoon floods	South Phyongan province	212,000	June/July
20	India Cyclonic storm Nilam	Andhra Pradesh state and Tamil Nadu state	210,000	October

Whether or not, and how people move in reaction to a sudden-onset environmental disruption depends among other things on the ability of the affected population to cope with the impact of the

¹⁸³ M. Yonetani, 'Global estimates 2012. People displaced by disasters', Report of the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), May 2013, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/99E6ED11BB84BB27C1257B6A0035FDC4/\\$file/global-estimates-2012-may2013.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/99E6ED11BB84BB27C1257B6A0035FDC4/$file/global-estimates-2012-may2013.pdf), p. 16.

hazard¹⁸⁴. Furthermore, the emergency relief provided to the population in the immediate aftermath of the disaster is crucial to prevent horrific displacement situations. In the medium- to long-term, factors such as the physical and economic recovery of the affected region, the recovery of ecosystem services, as well as individual livelihood rebuilding play a significant role in deciding whether or not displaced people return to their homes.

B. Technological accidents

Technological disasters, such as industrial and chemical accidents, can seriously destroy the environment, making it, temporarily or even permanently, unsuitable for human habitation¹⁸⁵. Such accidents can often be attributed to poor construction or management planning, or neglected safety procedures¹⁸⁶. In the past, various accidents have forcibly displaced large numbers of persons. The nuclear accident at Three Mile Island in the United States in 1979 forced 100.000 families to leave their environment temporarily, while 10.000 people were permanently displaced¹⁸⁷. In 1984, the chemicals released by the Bhopal accident displaced 200.000 people¹⁸⁸. The nuclear accident in

¹⁸⁴ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e20.

¹⁸⁵ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 373; J. Hong, 'Refugees of the 21st Century: Environmental Injustice', 10 *Cornell J.L. & Pub. Pol'y* 323, 2001, p. 333-335; D. Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"', 16 *Georgetown International Environmental Law Review* 209, 2004, p. 212-213.

¹⁸⁶ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 373.

¹⁸⁷ B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Env'tl. L.J.*, 2007, p. 72; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 373; D. Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"', 16 *Georgetown International Environmental Law Review* 209, 2004, p. 212; G.S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', 6 *Geo.Int'l Env'tl. L. Rev.*, 1993, p. 162.

¹⁸⁸ B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Env'tl. L.J.*, 2007, p. 71; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 373; D. Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"', 16 *Georgetown International Environmental Law Review* 209, 2004, p. 212; G.S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration', 6 *Geo.Int'l Env'tl. L. Rev.*, 1993, p. 163.

Chernobyl displaced up to 100.000 people, and a thirty-mile zone around Chernobyl remains permanently uninhabited¹⁸⁹.

1.3.2. According to the type of movement

Each of the above described categories of environmental drivers of migration will have different effects on the type of movement. The pace of change in the environment, as well as the duration and severity of the environmental disruption, has an important influence on the mode of the migration or displacement¹⁹⁰. Although currently most environment-induced migrants move within the borders of their country, cross-border migration is not excluded¹⁹¹. Another distinction is that between temporary and permanent movement¹⁹². Sudden-onset environmental disruptions mostly lead to temporary migration, while gradual environmental degradation often permanently displaces people. Furthermore, the element of 'force' allows us to distinguish between 'migrants' and 'displaced persons'. Indeed, gradual environmental degradation leaves more space to choose the point of departure and destination than sudden-onset environmental disruptions¹⁹³. Finally, as already discussed above, environmental changes might also limit people's capacity to move, thereby stopping them from leaving their destructed environment.

Based on a multitude of studies in a wide range of countries, it can be concluded that human mobility affected by environmental changes can lead to 10 distinct migration outcomes:

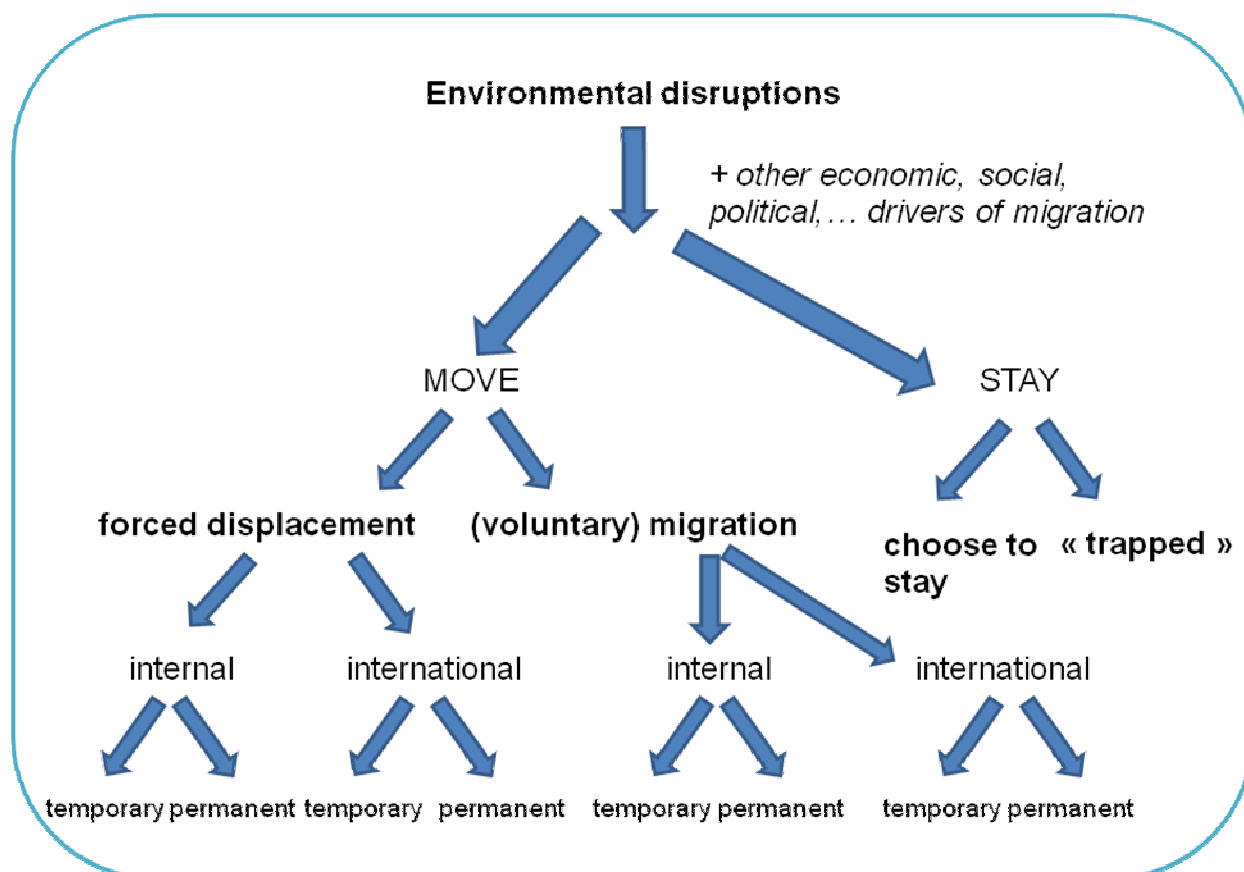
¹⁸⁹ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 373; D. Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"', 16 *Georgetown International Environmental Law Review* 209, 2004, p. 212.

¹⁹⁰ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e5.

¹⁹¹ F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 14.

¹⁹² F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 6.

¹⁹³ German Advisory Council on Global Change (WBGU), *Climate Change as a Security Risk*, Earthscan, London, 2008, 271 p., available at: http://ccsl.iccip.net/wbgu_jg2007_engl.pdf, p. 118.



Each of these outcomes represents different challenges for policymakers, requiring different legal and policy solutions. For example, in order to give people the choice to stay, which is a positive mobility outcome, the necessary assistance and protection needs to be provided to vulnerable populations. Furthermore, the opportunity to stay may even depend on the ability for other family or community members to migrate voluntarily, as remittances might provide households and communities with important income support (*see further under Chapter II*)¹⁹⁴.

1.3.2.1. Internal vs. international migration/displacement

Predicting the direction of future movements of environment-induced migrants is an extremely difficult task. Although currently most environment-induced population movements take place within the affected country, a substantial number of environment-induced migrants cross

¹⁹⁴ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 16.

international borders, of which most relocate to nearby countries within their own region¹⁹⁵. However, even intercontinental migration is not excluded. Furthermore, it is expected that in the future, an increasing number of environment-induced migrants will try to rebuild a better life in other countries, as the environmental conditions in their home countries worsen. In particular those permanently displaced due to the adverse effects of climate change will increasingly try to cross international borders.

Although the distinction between internal and international migration is a core element of the current international refugee regime, some authors see little analytical value for such a distinction for environment-induced migrants and displaced persons¹⁹⁶. Biermann and Boas argue for example that the differentiation in protection depending on whether environmentally-displaced persons cross international borders, is difficult to justify on legal or ethical grounds¹⁹⁷. However, this distinction is crucial for a study like the present one, where legal migration opportunities for environment-induced migrants form the core of the research. After all, an important feature of the distinction between internal and international migrants is the fact that the latter can only migrate legally when the country of their destination grants them a legal residence status on the territory, for example in case their flight motive gives them a right to be protected in their country of flight.

¹⁹⁵ D.C. Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change', 23 *Population and Environment* 5, 2002, p. 473; F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 14; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 389.

¹⁹⁶ F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 6-8; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 386-387.

¹⁹⁷ F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 8.

1.3.2.2. Temporary vs. permanent migration/displacement

Another distinction often made in literature is the one between temporary and permanent environment-induced migration¹⁹⁸. Sudden-onset environmental disruptions would mostly lead to temporary migration, while gradual environmental degradation would often permanently dislocate people, in particular in case the region of origin no longer exists, such as in case of the so-called “sinking” island nations. However, even sudden natural hazards can lead to permanent out-migration. Whether or not people displaced due to disasters such as floods, hurricanes and earthquakes decide to return, depends for instance on the pace and quality of the recovery process of the affected region¹⁹⁹.

Similarly, people can decide to return to a region affected by a process of gradual environmental degradation, if for example the necessary support, livelihood alternatives or even projects of ecological restoration can offer them a better future. As discussed above, Saddam Hussein’s regime had drained the wetlands of Southern Iraq, turning them into desert, thereby driving the Marsh Arabs away from their homelands (*see above in Section 1.1.4.4.*). However, since the regime change in Iraq, significant efforts have been done to restore the original marshlands, and regain the wide biodiversity of these important wetland habitats. Together with the returning wildlife, the Marsh Arabs were offered a possibility to return to their original way of living. Although the process was difficult, large parts of the marshlands have now been restored, and the Marsh Arabs have partly returned to their region of origin²⁰⁰.

Another interesting example of return migration can be found in Niger, where it has been shown that return migration itself can even contribute to the ecological restoration of a degraded region of origin. As discussed above (*see above in Section 1.1.4.3.*), working age men have increasingly left their region of origin in Niger due to droughts and ecosystem degradation, caused among others by the shrinking of Lake Chad. The women, children and elderly who stayed behind, lacked sufficient

¹⁹⁸ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 6.

¹⁹⁹ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e23.

²⁰⁰ See *inter alia*: A. Lawler, ‘Ecology: Reviving Iraq’s Wetlands’ in 37 *Science* 5713, 25 February 2005, p. 1186-1189; S. D. Newman, ‘The Plight of the Marsh Arabs, an Environmental and Human Rights Crisis: An Application of Complexity Theory’, 30 *Advances in Nursing Science* 4, 2007, p. 315–328.

physical support to restore the environment. In 2006 the government therefore started a programme, offering financial support to encourage young men to return to their region of origin, and to take part in the ecological restoration of the environment. The programme created about 35.000 temporary jobs, including the fixing of sand dunes, controlling tree chopping, digging half moons, and digging out sand from the river²⁰¹. This way, the project not only offered returning migrants a livelihood opportunity, but also contributed to the ecological restoration of their environment.

The distinction between temporary and permanent migration has its value for the elaboration of suited legal and policy answers to environment-induced population movements, as both categories clearly have different needs. Persons temporarily displaced due to environmental disruptions require care that is more akin to traditional disaster relief, while long-term migrants or displaced people need proper assistance for their permanent relocation in a safer area²⁰².

1.3.2.3. Forced vs. voluntary migration

Last, but certainly not least from a legal perspective, it is important to distinguish between forced migration or displacement and 'voluntary' migration. The element of 'force' or 'necessity' can indeed be crucial in the decision to migrate in reaction to environmental stressors²⁰³. Whether or not people are *forced* to leave their original habitat, depends for a large part on the type of environmental disruption. Obviously, gradual environmental degradation leaves more space to choose the point of departure and destination than sudden environmental disruptions²⁰⁴. Furthermore, other elements, such as the provision of emergency relief and international assistance, the recovery process after a disaster has hit, the strength of financial and institutional resources, the adaptive capacity of the population, the presence of alternative livelihood provisions or the possibility of ecological

²⁰¹ T. Afifi, 'Economic or Environmental Migration? The Push Factors in Niger', 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e112-e113.

²⁰² F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 4.

²⁰³ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e7.

²⁰⁴ German Advisory Council on Global Change (WBGU), *Climate Change as a Security Risk*, Earthscan, London, 2008, 271 p., available at: http://ccsl.iccip.net/wbgu_jg2007_engl.pdf, p. 118.

restoration, help to determine to what extent people *have* to leave their environment in order to survive²⁰⁵.

While at first sight forced environment-induced migration is generally linked to sudden-onset hazards, also slower-onset environmental degradation can forcibly displace individuals or larger communities. When people decide to migrate or not to return to their original habitat despite the possibility to rebuild their life or the presence of alternative livelihoods, they are considered as environmentally motivated migrants. However, when a degraded ecosystem needs a relatively long time to be restored, or when lost ecosystem services cannot be compensated by alternative means nor restored, individuals leaving the destructed environment should be considered as environmentally displaced persons, even if their migration process occurs more gradual than in case of a sudden-onset disaster²⁰⁶. Similarly, in a situation of “physical disappearance of land”, for instance in case of Pacific island nations such as Tuvalu, people will in the end have no other choice but to leave their environment.

It is therefore important to point out that the element of ‘force’ does not always refer to an urgent situation. Renaud et al. differ for instance between “environmental emergency migrants”, “environmentally forced migrants”, and “environmentally motivated migrants”. The first group consists of “individuals who flee the worst of an environmental impact on a temporary basis”, referring mostly to people fleeing the impacts of sudden-onset natural hazards such as hurricanes or earthquakes. For “environmentally-forced migrants”, their flight is then less urgent than for the first category, but they do “have to leave in order to avoid the worst of environmental deterioration”. The environment is the major push factor in their migration decision. Finally, “environmentally motivated migrants” are those who “may leave a steadily deteriorating environment in order to pre-empt the worst”. While there is no emergency, nor an element of “force” in their decision to move, those individuals act proactively in order to avoid worsening environmental conditions²⁰⁷.

²⁰⁵ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 5-6.

²⁰⁶ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e22.

²⁰⁷ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e14-e15.

However, as slow-onset degradation processes, in particular the phenomenon of sea level rise, manifest themselves gradually, it is often unclear when the point is reached when voluntary migration turns into forced displacement. It is for instance difficult to establish at which point in time there is no longer an adaptation alternative available to the affected community. Some authors therefore conceptualise the decision to migrate as a “continuum” going from people with no control over their relocation on the one hand to voluntary migrants on the other hand²⁰⁸. As for the inhabitants of threatened island nations in the Pacific and Indian Ocean, we know for instance that they will have no other choice but to leave their country once their island disappears beneath the waves. However, the islands will become uninhabitable long before this worst case scenario takes place, as salinisation of freshwater and the increasing frequency and severity of storm surges will seriously affect the quality of life on the islands²⁰⁹. If the inhabitants proactively decide to emigrate before they have no other options left, it is unclear whether we should treat, and protect, them as environmentally-displaced persons, or whether they are ‘just’ environmentally-motivated migrants, with no – at least moral – ‘right’ to be protected.

Nonetheless, for the elaboration of a legal framework regarding environment-induced migration, it is important to distinguish between forced and voluntary migration. Similar to the 1951 Refugee Convention and European complementary protection regimes (*see further under Chapter III*), which only apply to specific forms of *forced* migration, a new or adapted protection regime regarding environment-induced population movements would only grant legal asylum-like protection to environmentally-displaced persons. In line with the definition elaborated above, such a protection regime would thus apply to “any person which has been forced to leave its habitual residence, mainly because of a marked environmental disruption (natural and/or triggered by people) that jeopardised his existence and/or seriously affected the quality of his life, and is unable to avail himself of the protection of his home State due to the State’s unwillingness or inability to protect him”. And similar to the cessation clause in the 1951 Refugee Convention²¹⁰, it would then no longer apply to persons who are able to return to their former habitual residence, because the environmental cause of the displacement has ceased to exist, or because they are able to re-avail themselves of the protection of

²⁰⁸ D.C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’, 23 *Population and Environment* 5, 2002, p. 467-468; H. Graeme, ‘Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific’, in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Publishing, Oxford, 2010, p. 12.

²⁰⁹ F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework for Environmentally Induced Migration’, in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e22.

²¹⁰ Article 1C of the Convention Relating to the Status of Refugees, adopted on 28 July 1951 in Geneva, entered into force on 22 April 1954, 189 *UNTS* 137 (hereafter: “1951 Refugee Convention”).

the country of their former habitual residence. For this reason, when developing a protection regime for environmentally-displaced persons, it would have to be decided how and by whom it is determined whether or not people are compelled to flee in reaction to environmental changes.

In sum, the complex interaction of environmental, economic, political and social factors in the decision to leave a degraded environment leads to the above described categorisation, according to the origin as well as the type of the movement. The reason behind this categorisation is to come to more suited policy recommendations in the next Parts of this thesis. Categorising environment-induced migrants can help to determine who is most in need of international assistance, who needs legal protection in the form of asylum, and for whom migration can be a positive adaptation strategy. The next Section will therefore give an overview of how the phenomenon of environment-induced human mobility has been addressed up till now, and outlines what the challenges are for the future.

2. ADDRESSING THE PHENOMENON OF ENVIRONMENT-INDUCED HUMAN MOBILITY

2.1. Emergence of a new research field

2.1.1. History of research on environment-induced migration and displacement

Even though environment-induced migration is not a new phenomenon, the debate on this topic is relatively 'new'. While the earliest systematic theories of migration in the late 19th and early 20th century do mention environmental factors as one of the push factors for large migrations²¹¹, references to environmental changes disappeared from the migration literature during the twentieth century. While general migration studies were centred around the new Western theory that technological progress would diminish the influence of nature on human life, and a rather Marxist

²¹¹ See for an overview of these early migration studies: E. Piguet, 'From "Primitive Migration" to "Climate Refugees": The Curious Fate of the Natural Environment in Migration Studies', 103 *Annals of the Association of American Geographers* 1, 2013, p. 149-150.

vision where economic drivers of migration received most attention, forced migration studies were premised on the political paradigm that “States make refugees”²¹².

Together with the increasing interest for the worsening state of the environment, environment-induced migration came back in the picture in the 1980s and early 1990s. In particular the effects of climate change on human mobility have raised renewed interest in the topic. Influential reports from UNEP researcher El-Hinnawi²¹³ and the Worldwatch Institute²¹⁴ discussed the concept of ‘environmental refugees’ for the first time²¹⁵. In 1990, even the IPCC stated that “the gravest effects of climate change may be those on human migrations as millions will be displaced”²¹⁶. The beginning of more specific interest in the topic can be traced back to a few landmark academic publications, which contained rather alarming estimates of the number of people expected to migrate due to the adverse effects of global warming²¹⁷. In 1993, Myers predicted for example 150 million environmentally-displaced persons by the year 2050²¹⁸.

These early years of academic debate on the topic were marked by a strong focus on numbers and estimations, where environmental scientists used alarming predictions to raise awareness for the impacts of climate change²¹⁹. Next to for instance threatened polar bears, climate change-induced migrants thus became “iconic markers of climate change”²²⁰. Consequently, the debate on climate- and, more generally, environment-induced mobility was often seen as a security concern, where the

²¹² E. Piguet, ‘From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies’, 103 *Annals of the Association of American Geographers* 1, 2013, p. 152; E. Piguet, A. Pécoud, and P. De Guchteneire, ‘Migration and Climate Change: an Overview’, Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. 2-4.

²¹³ E. El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme (UNEP), Nairobi, 1985.

²¹⁴ J.L. Jacobson, *Environmental Refugees: A Yardstick of Habitability*, Worldwatch Paper 86, Worldwatch Institute, Washington DC, 1988.

²¹⁵ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 26-27.

²¹⁶ Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2007’, Fourth Assessment Report, Contribution of Working Group II on ‘Impacts, Adaptation and Vulnerability’, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson (eds), Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

²¹⁷ E. Piguet, A. Pécoud, and P. De Guchteneire, ‘Migration and Climate Change: an Overview’, Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. 3.

²¹⁸ N. Myers, ‘Environmental Refugees in a Globally Warmed World’, 43 *Bioscience* 11, 1993, p. 752-761.

²¹⁹ F. Gemenne, ‘How they Became the Human Face of Climate Change. Research and Policy Interaction in the Birth of the ‘Environmental Migration’ Concept’, in E. Piguet, A. Pécoud and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 231-236.

²²⁰ E. Piguet, ‘From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies’, 103 *Annals of the Association of American Geographers* 1, 2013, p. 153.

fear of millions of 'climate refugees' coming to the developed world provoked heated discussions. This alarmist view also fed the perceived need, in particular among certain NGOs, to develop new legal asylum categories to deal with millions of environmental or climate 'refugees' in the future²²¹. On the other hand, migration specialists were much more sceptic, and used the lack of empirical evidence on existing flows of environment-induced migration as an argument against the singling out of environmental changes as a push factor of certain population movements²²². They were much more cautious regarding the estimates of natural scientists, and argued that the concept of 'environmental migrants' contributed to further stigmatisation of international migrants²²³. Landmark publications such as the one of anthropologist Gaim Kibreab²²⁴ and geographer Richard Black²²⁵ even dismissed the concept of environmental migration as a whole, due to the multi-causality of migration. This dissension between alarmists and sceptics, which was, interestingly enough, a divide between environmental scientists and migration researchers, marked the tone of the debate for several years²²⁶.

Fortunately, the debate has become much more nuanced since those first years. From the 1990s on, the topic was increasingly studied in the academic literature. The amount of scientific reviews of environment-induced human mobility has gone up exponentially. Throughout the 1990s and 2000s, an abundance of academics has widely debated the concept and existence of environment-induced

²²¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 26-27; V. Kolmannskog, *Future floods of refugees. A comment on climate change, conflict and forced migration*, Norwegian Refugee Council (NRC), April 2008, available at: http://www.nrc.no/arch/_img/9268480.pdf, p. 9-10.

²²² E. Piguët, A. Pécoud, and P. De Guchteneire, 'Migration and Climate Change: an Overview', Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguët-Pecoud-de%20Guchteneire_01.pdf, p. 3; F. Gemenne, 'How they Became the Human Face of Climate Change. Research and Policy Interaction in the Birth of the 'Environmental Migration' Concept', in E. Piguët, A. Pécoud and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 236-239.

²²³ For sceptic views on the concept of environment-induced migration, see for example: R. Black, 'Environmental refugees: myth or reality?', *New Issues in Refugee Research*, UNHCR Working Paper No. 34, March 2001, available at: <http://www.unhcr.org/research/RESEARCH/3ae6a0d00.pdf>; S. Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate', *New Issues in Refugee Research*, UNHCR Working Paper No. 70, October 2002, available at: <http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf>; S. Castles and C. Rajah, 'Environmental Degradation, Climate Change, Migration and Development', Working Paper of the Acción Global de los Pueblos sobre Migración, Desarrollo y Derechos Humanos', Mexico, 2010, p. 3-4.

²²⁴ G. Kibreab, 'Environmental causes and impact of refugee movements: A critique of current debate', 21 *Disasters* 1, 1997, p. 20-38.

²²⁵ R. Black, 'Environmental refugees: myth or reality?', *New Issues in Refugee Research*, UNHCR Working Paper No. 34, March 2001, available at: <http://www.unhcr.org/research/RESEARCH/3ae6a0d00.pdf>.

²²⁶ O. Dun and F. Gemenne, 'Defining 'Environmental Migration'', *Forced Migration Review* nr. 31, October 2008, p. 10; S. Castles and C. Rajah, 'Environmental Degradation, Climate Change, Migration and Development', Working Paper of the Acción Global de los Pueblos sobre Migración, Desarrollo y Derechos Humanos', Mexico, 2010, p. 2.

migration, the categorisation and definition of “environmental migrants”, and the applicability of existing legal frameworks, in particular related to cross-border migration. Concerning the latter, a consensus has grown among legal researchers, which recognises the existence of a protection gap for environment-induced migrants in case they are forcibly displaced across international borders (*see further under Chapter III*). Yet most of them agree that the development of a new, *sui generis*, global framework for environmentally-displaced persons, comparable to the 1951 Refugee Convention, is neither a suitable nor a likely option to fill this gap²²⁷.

As a lack of empirical evidence was still challenging the debate, an empirical research base on environment-induced population movements began to develop more accurately in the mid 2000s²²⁸. Various governmental and non-governmental funds were used to finance field-based research, and different case studies on the linkage between migration and environmental changes were published. The European Commission funded for example the Environmental Change and Forced Migration Scenarios Project (EACH-FOR), in order to collect data on and describe causes of environment-induced population movements. The 23 case studies carried out by researchers associated with the EACH-FOR project provided policymakers with plausible future scenarios of environment-induced migration²²⁹. In 2007, the IPCC highlighted in its Fourth Assessment Report that increases in drought, intense tropical cyclone activity and extreme sea levels are likely to lead to increased migration²³⁰. More recently, the Foresight Report gathered the findings of a wide range of experts from various

²²⁷ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 20.

²²⁸ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 20. See for an overview of the numerous reports and papers published in this period: F. Gemenne, ‘How they Became the Human Face of Climate Change. Research and Policy Interaction in the Birth of the ‘Environmental Migration’ Concept’, in E. Piguet, A. Pécoud and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 225-259.

²²⁹ J. Jäger, J. Fröhmann, S. Grünberger and A. Vag (eds.), *Environmental Change and Forced Migration Scenarios (EACH-FOR)*, Synthesis report of 14 May 2009, available at: http://www.each-for.eu/documents/EACH-FOR_Synthesis_Report_090515.pdf; K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 6; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 19-21.

²³⁰ Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2007’, Fourth Assessment Report, Synthesis report, Core Writing Team: Pachauri, R.K. and Reisinger, A. (eds.), Geneva.

disciplines, and came to the conclusion that environmental changes influence global migration trends in very different ways than through a mere unidirectional link between environmental degradation and migration²³¹.

This and other empirical research led to more nuanced methodological studies in the late 2000s²³². According to Piguet, a more “pragmatic stance” developed, where quantitative and qualitative methods, together with large surveys, led to a better measurement and conceptualisation of the issue²³³. Various international conferences and workshops complemented these findings. For example in 2008, a ‘Research Workshop on Migration and the Environment: Developing a global research agenda’, organised by the United Nations University Institute for Environment and Human Security (UNU-EHS) and the IOM, together with the Munich Re Foundation (MRF) and UNEP, brought together 35 experts in the area of migration and the environment²³⁴. However, while natural and

²³¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011. See for a summary of the report’s conclusions in section 1.1.1. of this Chapter.

²³² K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 20. See for example: M. Leighton, ‘Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons’, The German Marshall Fund of the United States, Study Team on Climate-Induced Migration, June 2010, available at: http://www.gmfus.org/galleries/default-file/Leighton_MAH_EditsV2.pdf; K. Warner, C. Ehrhart, A. de Sherbinin, S. Adamo and T. Chai-Onn, ‘In Search of Shelter. Mapping the Effects of Climate Change on Human Migration and Displacement’, Report supported by Care International, CIESIN Colombia University, UNHCR, United Nations University and the World Bank, May 2009, available at: http://www.care.org/getinvolved/advocacy/pdfs/Migration_Report.pdf; German Advisory Council on Global Change (WBGU), *Climate Change as a Security Risk*, Earthscan, London, 2008, 271 p., available at: http://ccsl.iccip.net/wbgu_jg2007_engl.pdf; F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the evidence*, International Organization for Migration (IOM), Geneva, 2009; J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Publishing, Oxford, 2010; E. Piguet, A. Pécout and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011; S. Collinson, ‘Developing Adequate Humanitarian Responses’, The German Marshall Fund of the United States, Study Team on Climate-Induced Migration, June 2010, available at: http://www.gmfus.org/galleries/default-file/Collinson_MAH_EditsV2.pdf; S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 397-414; A. Warnecke, D. Tänzler and R. Vollmer, ‘Climate change, Migration and Conflict: Receiving Communities under Pressure?’, The German Marshall Fund of the United States, Study Team on Climate-Induced Migration, June 2010, available at: http://www.gmfus.org/galleries/default-file/Warnecke_MAH_EditsV2.pdf; R. Zetter, ‘Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks’, Research Report, Refugee Studies Centre, University of Oxford, February 2011.

²³³ E. Piguet, ‘From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies’, 103 *Annals of the Association of American Geographers* 1, 2013, p. 155-156.

²³⁴ ‘Research Workshop on Migration and the Environment: Developing a global research agenda’, organised by the United Nations University Institute for Environment and Human Security (UNU-EHS) and the IOM, together with the Munich Re Foundation (MRF) and UNEP, 16-18 April 2008, Munich, Germany, programme available at: <http://www.ehs.unu.edu/file/get/3690>; F. G. Renaud, O. Dun, K. Warner and J. Bogardi, ‘A Decision Framework

social scientists had already come to a more refined understanding of the connection between human mobility and environmental changes, most legal research still had to develop beyond studying the applicability of existing frameworks for the protection of forced migrants to the issue of environment-induced displacement.

2.1.2. Current status of the discourse on environment-induced human mobility

2.1.2.1. In general

Today, alarmists and sceptics have found each other: while environmental scientists have left their apocalyptic and alarming predictions behind, migration scientists now recognise the role of environmental changes on human mobility²³⁵. A wide range of empirical studies has established a solid knowledge base on environment-induced migration, where the influence of environmental changes on migration is now solidly proven, albeit recognising the multi-causality of migration and the rather complicated connection between environmental changes and human mobility. Almost three decennia of academic research on the topic have led to more empirical as well as conceptual clarity regarding environment-induced population movements. Furthermore, there is now a consensus among scholars that the issue should not be treated as a mere security concern for industrialised countries, and that the fear of many millions of so-called “climate refugees” coming to developed countries is unfounded. However, even though the migration outcome can vary significantly, depending on the type of environmental change affecting migration, the specific circumstances of the region of origin, the adaptive capacity and resilience of the affected community as well as a range of individual circumstances, research suggests that the situation is just as serious, and needs to be urgently taken into consideration in international and national policymaking alike²³⁶.

for Environmentally Induced Migration’, in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e24.

²³⁵ E. Piguet, A. Pécoud, and P. De Guchteneire, ‘Migration and Climate Change: an Overview’, Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. p. 4.

²³⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 25.

Therefore, the time has come now to translate the above described research findings into more concrete policy recommendations.

Currently, the topic of environment-induced migration is still extensively discussed by a wide range of scholars coming from various disciplines. The IPCC even dedicated a whole sub-chapter on the issue in the contribution of Working II to its Fifth Assessment Report, which was released in 2014²³⁷. Moreover, geographers, anthropologists, economists, social, political and even legal researchers are increasingly communicating on this topic, in order to further expand the knowledge base and come to a more refined understanding on the nexus between environmental changes and migration. Indeed, the topic of environment-induced migration is intrinsically multidisciplinary. As Gemenne argues, “whereas the study of environmental change usually draws on the natural sciences for its evidentiary basis, the study of migration is typically the preserve of the social sciences”²³⁸. Furthermore, political scientists discuss the development of policy responses in various areas to address the linkage between migration and environmental changes, while legal research is needed to examine and further develop these policy responses in the light of national and international legal frameworks.

2.1.2.2. Recognising migration as an adaptation strategy

The past decades, most academic attention focused on the negative consequences of environmental changes for human mobility, namely the forced displacement of people, and the lack of protection mechanisms for those which are forced to leave their environment in order to survive. However, since a couple of years, it is increasingly recognised that migration should not only be regarded as a “failure of adaptation”, but that migration itself can be a positive adaptation strategy for vulnerable

²³⁷ Intergovernmental Panel on Climate Change (IPCC), ‘Fifth Assessment Report: Contribution of Working Group II to the IPCC’s 5th Assessment Report, *Climate Change 2014: Impacts, Adaptation, and Vulnerability*’ (Final Draft Report released on 31 March 2014), available at: <http://ipcc-wg2.gov/AR5/report/final-drafts/>. See Chapter 12.4. on ‘Migration and Mobility Dimensions of Human Security’, p. 11-15; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 20-21.

²³⁸ F. Gemenne, ‘How they Became the Human Face of Climate Change. Research and Policy Interaction in the Birth of the ‘Environmental Migration’ Concept’, in E. Piguët, A. Pécoud and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 226.

communities²³⁹ (see further under Chapter II). One of the most important messages from environmental and social scientists, is that we need to increase the range of adaptation alternatives available to vulnerable communities. In this sense, migration can help people to adapt to a changing environment, for example by providing them with an alternative livelihood, or by relieving population pressure in affected areas. According to the recent Foresight Report, “[m]igration can represent a ‘transformational adaptation’ to environmental change, and in many cases is an effective means to build long-term resilience”²⁴⁰. Well-organised adaptive migration can even reduce the chance of later humanitarian crises as a result of forced displacement²⁴¹.

This theory of migration as an adaptation strategy, which forms the point of departure for the rest of this study, poses various operational, financial and legal challenges, and will be discussed further below.

In sum, some of the current widely accepted ideas which are relevant for this study are:

- The influence of environmental changes on national and international migration is solidly proven through an abundance of empirical research.
- The linkage between environmental changes and migration is not as straightforward as first assumed. Instead the linkage appears to be three-folded:
 - people move *away* from areas with high environmental risks
 - people move *towards* areas with high environmental risks
 - people stay “*immobile*”, or “*trapped*” in areas with high environmental risks.
- Prohibiting migration is not an option. On the contrary, it renders populations even more vulnerable to the effects of environmental changes.
- Under certain conditions, migration might constitute a positive adaptation strategy, increasing individuals’, households’ and communities’ resilience to environmental change.

²³⁹ See for example C. Tacoli, ‘Crisis or adaptation? Migration and climate change in a context of high mobility’, 21 *Environment and Urbanization* 2, 2009, p. 513-525; S. Martin, ‘Managing Environmentally Induced Migration’, in F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration (IOM), Geneva, 2009, p. 355-386; S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 397-414; R. Black, S. Bennett, S. Thomas and J.R. Beddington, ‘Migration as Adaptation’, 478 *Nature* 7370, 27 October 2011, p. 447-449; H. Graeme, ‘Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific’, in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Hart Publishing, Oxford, 2010, p. 13.

²⁴⁰ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 21.

²⁴¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 9 (« key conclusions »).

- A legal protection gap for environmentally-displaced persons crossing international borders still remains.

2.2. Applicable legal frameworks

The topic of environment-induced migration as well as the proposed policy responses raise several important legal questions. Consequently, the role of several branches of international law in addressing this issue has been extensively discussed²⁴². Below, an overview is given of some of the main findings related to the contribution of each of the relevant international law branches to the treatment of the issue of environment-induced population movements, including the prevention of environment-induced migration, the protection of environmentally-displaced persons, the admission of environment-induced migrants into foreign countries, and the matter of exercisable rights in the place of arrival.

2.2.1. International environmental law

As environmental changes lie at the origin of environment-induced population movements, the question can be raised whether and to what extent international environmental law is the suited legal framework to address this issue. Indeed, the principles, rules and provisions of environmental law play a crucial role in the prevention of environment-induced migration, as they aim to protect the natural environment, thereby contributing to the protection of the livelihoods of human beings²⁴³. In the context of climate change for example, the UNFCCC²⁴⁴ aims to tackle the adverse effects of global warming through mitigation and adaptation activities (*see further under Chapter IV*), thereby addressing one of the causes of environment-induced migration.

²⁴² See for example: M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 61-84.

²⁴³ P. Sands, *Principles of international environmental law*, Cambridge University Press, Cambridge, 2003, p. 3; M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 68-69.

²⁴⁴ United Nations Framework Convention on Climate Change (UNFCCC), adopted on 9 May 1992 in New York, entered into force on 21 March 1994, 1771 *UNTS* 107.

Aside from this preventive role, the issue of environment-induced migration has, to a very limited extent, been explicitly addressed in international environmental law. In particular the UNFCCC framework has provided a forum to address this topic in international negotiations. The legal relevance and added value of such explicit provisions will be discussed further in PART II of this study.

2.2.2. *International human rights law*

According to Morel and de Moor, international human rights law is firstly relevant for the topic of environment-induced migration by stipulating the human rights of persons affected by environmental changes in their country of origin or habitual residence, such as the right to life, the right not to be deprived of a means of subsistence, and the right to an adequate standard of living, including food and housing²⁴⁵. As such, it also plays, at least theoretically, a preventive role for environment-induced migration, and in particular for the prevention of *forced* environment-induced displacement.

Furthermore, international human rights law becomes relevant in case environment-induced migrants cross international borders. For the question of the admission of displaced persons onto foreign territory, and/or the forced return of persons to regions affected by severe environmental disruptions, the principle of *non-refoulement* plays a crucial role. This principle prohibits states to return, expel or extradite a person in any manner whatsoever to another state where that person risks being subjected to certain serious human rights violations²⁴⁶. Whether or not this principle could protect international environment-induced migrants will be discussed further in Chapter III.

Finally, international human rights law contains provisions which are relevant for the treatment of environment-induced migrants in the country of arrival, whether they reside there regularly or irregularly. After all, human rights law applies to each person without discrimination. International environment-induced migrants thus enjoy all basic human rights, such as the right to life, the right to private life and home and the freedom of thought, irrespective of their residence status²⁴⁷.

²⁴⁵ M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 69-70.

²⁴⁶ K. Wouters, *International legal standards for the protection from refoulement*, Intersentia, Mortsels, 2009.

²⁴⁷ M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 70.

2.2.3. Migration law

As can be derived from the above described categorisation of environment-induced population movements, the overarching concept of environment-induced migration includes both internal and international migration, as well as both voluntary and forced migration. Within the relevant branch of migration law, we can thus further differ between the law of forced migration, and legislation regulating voluntary migration.

2.2.3.1. The law of forced migration

The law of forced migration, being closely related to international human rights law, contains rules and procedures serving to protect persons who are forcibly displaced for reasons specified in the relevant legal instruments. Displaced persons can be internally displaced, or internationally, seeking asylum in a foreign country.

As for the law of internal displacement, the most important provisions are to be found in the Guiding Principles on Internal Displacement²⁴⁸. This set of principles was developed in 1998 by the former UN Secretary-General Representative on internally-displaced persons, Francis M. Deng, and later adopted by the United Nations. Based on existing international human rights law and international humanitarian law, the Guiding Principles guide states on the protection of internally-displaced persons against, during, and after their displacement. As they apply to all persons forced to move within national borders, irrespective of the cause of their flight²⁴⁹, they also apply to environmentally-displaced persons which are displaced within national borders. They thus play an important role in the prevention of environment-induced displacement, as well as for the treatment of environmentally-displaced persons during and after their displacement. However, while the Guiding Principles mainly contain provisions which were already legally binding, they do remain a legally non-binding instrument, which needs to be incorporated into national or regional legislation and policy. Even though several states have translated the Guiding Principles into their national

²⁴⁸ Guiding Principles on Internal Displacement (GPID), Commission on Human Rights of the Economic and Social Council in its Fifty-fourth session, UN Doc. E/CN.4/1998/53/Add.2., 11 February 1998 (hereafter: Guiding Principles on Internal Displacement).

²⁴⁹ Principle 2 of the Guiding Principles on Internal Displacement.

legislation, the usefulness of this branch of international law still depends on states' political will and ability to protect the rights of internally-displaced persons on their territory.

As for internationally displaced persons, several legal instruments on forced migration have translated the *non-refoulement* principle contained in human rights law into more concrete provisions protecting certain categories of displaced persons. The most famous are the International Refugee Convention of 1951²⁵⁰ and its 1967 Protocol²⁵¹, which are, as discussed above, not applicable to environmentally-displaced persons.

Other instruments on international forced migration provide further protection than a mere prohibition to return, and deal both with the criteria for admission and legal status in a foreign country, as well as with rights that can be exercised in the host country. At the European level, the EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (EU Qualification Directive)²⁵² and the EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (EU Temporary Protection Directive)²⁵³, codify complementary protection regimes in the EU, thereby granting protection to displaced persons who do not fit within the international refugee definition, but are nonetheless in need of international protection. Finally, national legislators also have the possibility to install protection regimes granting asylum to displaced persons arriving in or residing on their territory. The applicability of these instruments of the law of forced migration to environmentally-displaced persons will be discussed further in Chapter III.

²⁵⁰ Convention Relating to the Status of Refugees, adopted on 28 July 1951 in Geneva, entered into force on 22 April 1954, 189 *UNTS* 137 (hereafter: "1951 Refugee Convention").

²⁵¹ Protocol Relating to the Status of Refugees, adopted on 31 January 1967, entered into force on 4 October 1967, 606 *UNTS* 267 (hereafter: "1967 Refugee Protocol").

²⁵² European Council, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal* L 304 of 30 September 2004, p. 12–23 (hereafter: Qualification Directive).

²⁵³ European Council, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *Official Journal* L 212 of 7 August 2001, p. 12–23 (hereafter: Temporary Protection Directive).

2.2.3.2. National, regional and international migration law

Aside from the law on forced migration, national, regional and international migration law also contains rules dealing with migrants who leave their country of origin or habitual residence ‘voluntarily’, whereby the extent of coercion in the decision to migrate may vary significantly. As the policy area of national borders and admission to the territory is still an important matter of state sovereignty, immigration rules are mostly to be found in national migration law. The national prerogative of defining who can enter a country’s territory and legally reside there, also accounts for international environment-induced migrants, whose legal status, in case they do not fall under an international or regional protection regime for forcibly displaced persons, depends on national migration law and policy.

However, at the international level, some legal instruments have been developed regarding the rights migrants can exercise in their country of stay. For example the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention) has been adopted by the United Nations in 1990 in order to reaffirm the rights which labour migrants can exercise in their country of employment²⁵⁴. The Convention defines a migrant worker as “‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’”²⁵⁵, irrespective of its legal status. If environment-induced migrants become engaged in a remunerated activity in a foreign country, they too fall under the Migrant Workers Convention²⁵⁶. However, up till now, only a few possible destination countries have ratified this Convention, as there is insufficient political will to protect migrant workers²⁵⁷.

In sum, international environmental law plays a substantial role in the prevention of environment-induced migration, and has, albeit only to a limited extent, explicitly addressed the issue. Human rights law on the other hand plays an important preventive role, as well as a normative role during and after environment-induced displacement. The role of the law on forced migration is a “palliative” one, protecting displaced persons against a forced return, and/or granting them a legal status in their

²⁵⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in New York on 18 December 1990, entered into force on 1 July 2003, 2220 UNTS 3 (hereafter: Migrant Workers Convention).

²⁵⁵ Article 2(1) of the Migrant Workers Convention.

²⁵⁶ M. Morel and N. de Moor, ‘Migrations climatiques: quel rôle pour le droit international?’, *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 81-82.

²⁵⁷ D. Weissbrodt, *The human rights of non-citizens*, Oxford University Press, Oxford, 2008, p. 186-188.

country of arrival²⁵⁸. National and regional immigration legislation determines whether environmentally-motivated migrants can be granted a legal residence status in a foreign country. Finally, international migration law as it currently exists, is particularly relevant with regard to the rights that environment-induced migrants can exercise in case they become migrant workers in a foreign country. While none of these branches of international, regional and national law can comprehensively address the issue of environment-induced migration, together, they might provide a satisfactory legal framework to develop adequate policy responses to this issue.

3. THE CHALLENGES AHEAD

3.1. In general

Even though the topic of environment-induced migration has now been intensively studied for many years, there still remains an important gap between the above described research findings and current policy measures to confront the issue. While measures have been taken to start the dialogue on environment-induced migration at some international and European fora, concrete and adequate policy measures are lacking on the ground. The years 2011-2012 however have been marked by some important developments, which have led to an important political momentum to start addressing the issue. The publication of the Foresight Report for example, as well as the creation of the state-led Nansen Initiative on Disaster-induced Cross-border Displacement²⁵⁹, are considered to be important milestones in this discussion. It is now time for policymakers to go a step further in the debate on environmental change and migration, and to engage in concrete actions.

As described above, the pace of the degradation or changes in the environment influences the mode and destination of the subsequent movement. The above proposed framework for categorising people migrating due to environmental changes could now help to address the lack of policy measures to confront the issue. The distinctions between different categories of environment-

²⁵⁸ M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 83.

²⁵⁹ <http://www.nanseninitiative.org/>. The Nansen Initiative is a state-led, bottom-up consultative process, launched in October 2012 by the Governments of Switzerland and Norway, and intended to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders by natural disasters, including the effects of climate change.

induced migrants have for example their value for the elaboration of a protection regime for environmentally-displaced persons, as different categories of displaced persons have different needs, and should thus be dealt with differently.

The majority of scholars agree that “‘no migration’ is not an option in the context of future environmental change”²⁶⁰. As both internal and international migration will continue to occur in the future, policymakers have the choice between well-managed and regular migration on the one hand, and, in case they choose to prohibit mobility, unplanned and forced migration, leading the affected communities towards even more harsh living conditions, on the other hand.

The three-phased approach to deal with environment-induced migration that has been proposed in academic literature is to:

1. prevent or minimise environment-induced migration, and in particular forced environment-induced displacement, where possible;
2. facilitate the role of migration as an adaptation strategy, where possible; and
3. ensure legal protection in case forced environment-induced displacement does occur.

1. Reducing the influence of environmental changes on human mobility can be achieved through environmental policies preventing or minimizing environmental changes, as well as through policies aiming to reduce the impact of environmental changes and helping communities to build resilience and adapt to changing environmental conditions²⁶¹.

2. As for the second approach, that is, facilitating internal and international adaptive migration, various scholars have studied the added value of migration as an adaptation strategy in the fight against global warming. According to the Foresight Report, “[t]he most future-resilient policies are those that move households and communities from situations in which they are trapped, or from where they are in vulnerable circumstances where displacement may occur”²⁶². Proactively facilitating migration will reduce the chance for communities of being trapped in vulnerable areas, or being displaced in circumstances raising even bigger geopolitical challenges, and can maximise the

²⁶⁰ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 16.

²⁶¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 18.

²⁶² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 17.

benefits of migration for adaptation and resilience-building²⁶³. However, in order to adequately assess and support the role of adaptive migration, there is now need for more specific and policy-oriented research, more funding to be allocated to projects regarding adaptive migration, and more political will to fully implement such projects.

3. Finally, the legal protection gap for people displaced due to severe environmental disruptions or worsening environmental conditions has been extensively described in academic literature. In order to ensure legal protection for environmentally-displaced persons, policymakers will need to think out of the box to develop the necessary protection regimes.

3.2. Research challenges

As for the development of the research on environment-induced migration, most scholars have long argued that the available evidence is still “far from satisfactory”²⁶⁴, and that more systematic research is needed to properly understand the linkage between environmental change and migration²⁶⁵. Furthermore, the existing research suffers from a lack of definitional and conceptual clarity as well as cross-disciplinary approaches²⁶⁶. However, the past few years, a huge quantity of empirical research has been carried out in different regions of the world, providing policymakers with a solid knowledge base on the nexus between environmental change and migration. While indeed there still remain gaps in the evidence base, I believe it is now time to give more academic attention

²⁶³ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 17.

²⁶⁴ E. Piguet, A. Pécoud, and P. De Guchteneire, ‘Migration and Climate Change: an Overview’, Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. 4.

²⁶⁵ See for example: E. Piguet, ‘From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies’, 103 *Annals of the Association of American Geographers* 1, 2013, p. 256-257; F. Laczo and C. Aghazarm, ‘Introduction and Overview: Enhancing the knowledge base’, in F. Laczo and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the evidence*, International Organization for Migration (IOM), Geneva, 2009, p. 29-33; C. Tacoli, ‘Crisis or adaptation? Migration and climate change in a context of high mobility’, 21 *Environment and Urbanization* 2, 2009, p. 513-525; S. Castles, ‘Concluding remarks on the climate change-migration nexus’, in E. Piguet, A. Pécoud and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 424-425.

²⁶⁶ E. Piguet, ‘From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies’, 103 *Annals of the Association of American Geographers* 1, 2013, p. 153.

²⁶⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 156.

to more policy-oriented research regarding the role of migration in the building of resilience and adaptive capacity of communities affected by environmental changes. Furthermore, the lack of a clear conceptual framework should not be used as excuse not to prepare for and respond to the challenges posed by environment-induced population movements.

As for the *legal* research regarding environment-induced migration, up to date, most studies have addressed the applicability of existing international and regional protection regimes for forcibly displaced persons. As mentioned above, legal researchers have a major role to play in the development of policy responses to environment-induced population movements. In particular the theory of migration as adaptation strategy deserves more legal attention. The proposed policy responses to facilitate migration as an adaptive response should now be translated into suited legal provisions.

While in the first decennia of research in this area, most legal researchers focused on the role of migration law, in particular the law of forced migration, nowadays, the focus has shifted towards international environmental law, in particular international climate law, as a legal framework to address environment-induced migration. Which specific legal framework is studied often depends on the specific background of the author. Unfortunately, human rights and refugee lawyers on the one hand and environmental lawyers on the other hand tend to stick to their own legal branch, whereby interaction between the different legal approaches is often lacking²⁶⁷. Furthermore, the opposing viewpoints of alarmists and sceptics have also led to disagreements regarding the legal framework necessary to address the issue of environment-induced population movements²⁶⁸. This research aims to address this flaw, by trying to bridge environmental law and migration law, in order to come to a more coherent policy approach to address environment-induced migration.

The current and future challenges posed by the nexus between migration and environmental change require a new strategic policy approach, as well as innovative legal responses to implement that approach. We need to plan and adapt our legal system now, protecting those which are forcibly displaced, whilst planning for some forms of adaptive migration, recognising its potential to build resilience to environmental changes and to offer opportunities to improve the lives of affected people. Before the next Chapter will shed further light on the benefits and challenges posed by international adaptive migration, the scope and limitations of this research need to be clarified.

²⁶⁷ M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 62.

²⁶⁸ F. Gemenne, 'How they Became the Human Face of Climate Change. Research and Policy Interaction in the Birth of the 'Environmental Migration' Concept', in E. Piguët, A. Pécoud and P. De Guchteneire (eds.), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 231-236.

4. SCOPE AND LIMITATIONS OF THIS RESEARCH

From the above overview of the discussion on the linkage between environmental change and migration, it becomes immediately clear that a research on this topic cannot exhaustively incorporate all the elements relevant to this topic. As every study needs to delimit its content, this research inevitably has a limited scope, both concerning the type of environment-induced migration, as well as the category of proposed policy responses.

Firstly, the present study focuses on *international* environment-induced migration. Internal movements, though having numerical superiority, are thus beyond the scope of this study. Aside from reasons of research feasibility, the category of international environment-induced migrants poses the biggest legal challenges for international and national policymakers.

Secondly, the focus of this study lies mainly on *adaptive* migration, as one of the proposed policy solutions to address environment-induced population movements. While the prevention of environment-induced migration as well as the protection of environment-induced displaced persons are obviously of no lesser relevance, this research aims to fill a scholarly gap by addressing which legal frameworks are best suited to facilitate international migration as an adaptation strategy. Previous legal studies have either not or only briefly dealt with international adaptive migration. More in particular, they have not considered how to translate concrete policy recommendations regarding adaptive migration into the necessary legal provisions. On the other hand, most legal studies on environment-induced migration have focused on the legal protection of people forcibly displaced due to changing environmental conditions. For reasons of comprehensiveness, Chapter III will offer insight into some of the normative developments in this field.

The present study is a *legal* one. It aims to examine the role of various legal frameworks in relation to international adaptive migration. However, as correctly stated by Piguet *et al.*, environment-induced migration is a field of study which “is inherently political, which means that research and statements regarding the climate change – migration nexus are very hard to dissociate from the highly politicised debate on climate change itself”²⁶⁹. Both international mobility and worldwide environmental changes are considered as very ‘sensitive’ topics, which lie at the ground of heated political

²⁶⁹ E. Piguet, A. Pécoud, and P. De Guchteneire, ‘Migration and Climate Change: an Overview’, Centre on Migration, Policy and Society (COMPAS), Working Paper No. 79, University of Oxford, 2010, available at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1079%20Piguet-Pecoud-de%20Guchteneire_01.pdf, p. 4.

disagreements. The topic of environment-induced migration brings these two difficult topics together, which makes the discussion even harder. Therefore, where necessary or unavoidable, this legal research will also take the political context into account when trying to develop relevant legal and policy recommendations.

This research examines the role of two of the relevant law branches, that is, international environmental law on the one hand, and international, regional and national migration law on the other hand, in relation to various aspects of international adaptive migration. Some of the aspects identified are the issue of admission of migrants into foreign countries, and the question of the organization and financing of international adaptive migration. Other aspects, such as the prevention of environmental changes or the matter of exercisable rights in the country or place of arrival, are outside the scope of this study.

Finally, this study is also geographically limited. As already indicated above, the aim of this research is to translate policy recommendations regarding international adaptive migration into concrete legal solutions, taking existing legal frameworks into account. More in particular, one of the goals is to look at the role of migration law regarding this issue. Consequently, due to the limited power of international law regarding the question of admission of migrants onto foreign territory, a part of this research necessarily has a regional orientation. PART III of this study therefore covers regional migration law within the EU as a case study of how migration law can facilitate international migration as an adaptation strategy for communities affected by environmental changes. As a result, PART III does not cover other geographical regions, except where examples can be useful for the development of European policy options.

Chapter II. International migration as an adaptation strategy

According to the 2009 UN Human Development Report, international migration can not only contribute greatly to human welfare and development, but may also represent a vital strategy for households seeking to improve their livelihoods in the face of environmental changes²⁷⁰. As environmental degradation, and in particular the phenomenon of climate change, poses new challenges to both migration and development, innovative and comprehensive policy measures are needed to confront these additional challenges. Among other measures, comprehensive adaptation strategies are needed to help affected and vulnerable communities to adapt to a changing environment. As mentioned above, facilitating legal migration for vulnerable communities affected by environmental disruptions, could act as a possible adaptation strategy. If certain conditions are fulfilled, proactive migration could become a way to prevent forced displacement and to increase the resilience of affected populations. Where vulnerability to environmental disruptions is high, and socio-economic opportunities are low, migration is already used as a coping strategy for vulnerable communities.

However, even though the debate on environment-induced migration emerged more than thirty years ago, the international community has long failed to recognise migration as a strategy of livelihood diversification and resilience building. Most scholarly articles and reports focused on the negative consequences of environmental degradation for human mobility - namely the forced displacement of people -, and the lack of protection mechanisms for environmentally-displaced people. However, there is now an increasing acknowledgement that migration can have positive effects on individuals, households and communities affected by environmental degradation. The issue has even made it into the international climate negotiations on a new adaptation framework (*see further in Chapter IV*). Yet the migration law and policy of most developed countries has not been adapted to this change of reasoning. As most environment-induced movements are expected to occur in and between developing countries, there has been no incentive for developed countries

²⁷⁰ United Nations Development Programme (UNDP), *Human Development Report 2009: 'Overcoming barriers: Human mobility and Development'*, Palgrave Macmillan, New York, 2009, available at: http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf, p. 45-46; F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration S1*, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p.e10.

to adapt their immigration legislation, and to develop a proactive strategy linking migration with development and adaptation²⁷¹.

This Chapter aims to describe exactly how migration can contribute to the adaptive capacity of communities affected by various environmental degradation processes. Based on the available social science, it documents how to maximise the benefits of migration for development and adaptation, and to minimise its costs. Through illustrations of international adaptive migration, offering livelihood alternatives through permanent or temporary work abroad, some of the associated legal and political challenges will be revealed.

1. THE CONCEPT OF ADAPTIVE MIGRATION

1.1. How migration can help communities to adapt to a changing environment

Climate change, the loss of biodiversity and other environmental disruptions have severe effects on people's livelihoods. In particular those communities who strongly rely on ecosystem services for their livelihoods are most vulnerable to the degradation of the environment²⁷². For those regions where climate change mitigation measures are too little and come too late, people will have to adapt to a degrading environment. In the context of climate change, 'adaptation' is defined as "initiatives and measures to reduce the vulnerability of natural and human systems against actual or expected climate change effects"²⁷³. Where people are able to adapt, they might be able to remain in their environment. Where adaptation fails and people can no longer survive in their degraded

²⁷¹ F. Laczko, 'Migration, the Environment and Climate Change: Assessing the Evidence', the German Marshall Fund of the United States, Study Team on Climate-induced Migration, June 2010, available at: http://www.gmfus.org/galleries/default-file/Laczko_MAH_EditsV2.pdf; S. Martin, 'Managing Environmentally Induced Migration', in F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration (IOM), Geneva, 2009, p. 355-386.

²⁷² J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009.

²⁷³ Intergovernmental Panel on Climate Change (IPCC), 'Fourth Assessment Report, Working Group II: Impacts, Adaptation and Vulnerability, Appendix 1 (Glossary)', Geneva, 2007, p. 869.

environment, they might be forced to leave their traditional habitat. However, there is now a growing recognition that migration itself might be one of the possible strategies to adapt to a changing environment.

If *in situ* adaptation measures are insufficient, people might choose to migrate in search for a better life. Whether or not people opt for migration depends on their resilience to the environmental changes they are affected by, namely their ability to cope with environmental degradation. This is for a large part determined by the availability of alternative livelihoods²⁷⁴. In this sense, income diversification through labour migration can act as an adaptive response to environmental stressors. Adaptation thus involves both measures to reduce a population's vulnerability, so as to prevent them from having to migrate, and migration itself as an adaptation strategy that allows people to reduce their vulnerability²⁷⁵. In Ghana for example, research found that outmigration was the most widely used means of income diversification to enhance livelihoods in the face of environmental degradation, before non-farm activities such as trading and handicrafts, which shows that migration can indeed be considered as "a transformational adaptation strategy, as opposed to just 'improving' the coping of a community in particular vulnerable areas"²⁷⁶.

While most people migrate within the borders of their own country, at least in a first movement, international movement can also be part of such adaptive migration responses. By earning a livelihood abroad, international migration can reduce the vulnerability of individuals, households and communities to environmental risks, and increase their resilience²⁷⁷. Facilitating international migration for persons affected by environmental degradation can thus prevent them from being forcibly displaced in already over-populated and environmentally-fragile places within their own region. It offers for example an alternative for rural-urban migration, whereby vulnerable migrants often end up in the slums of over-populated cities. *Temporary* international migration could furthermore act as an alternative for permanent internal migration, and can mitigate pressure on

²⁷⁴ S. Martin, 'Climate Change, Migration and Governance', 16 *Global Governance on Migration* 3, July-September 2010, p. 397-414.

²⁷⁵ S. Martin, 'Climate Change, Migration and Governance', 16 *Global Governance on Migration* 3, July-September 2010.

²⁷⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 21.

²⁷⁷ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 22-26; F. Lazcko, 'Migration, the Environment and Climate Change: Assessing the Evidence', the German Marshall Fund of the United States, Study Team on Climate-induced Migration, June 2010, available at: http://www.gmfus.org/galleries/default-file/Lazcko_MAH_EditsV2.pdf, p. 4; C. Tacoli, 'Crisis or adaptation? Migration and climate change in a context of high mobility', 21 *Environment and Urbanization* 2, 2009, p. 513.

vulnerable places. Through earning a livelihood abroad, migrants can also reduce the vulnerability of their communities of origin, so as to cope better with future environmental disruptions.

The benefits of international migration for both adaptation and development are thus many-fold. Firstly, the money transferred by foreign workers to their native countries ('remittances') plays a vital role in the economic welfare of their families and communities of origin. This income diversification can for example provide families with a livelihood alternative when they are struck by natural disasters²⁷⁸. In this sense, migration of one or more members of the household can help the rest of the family to increase their resilience to environmental disruptions, thereby diminishing the migration need for other family members²⁷⁹. A study of Ezra and Kiros described for example how Ethiopian households affected by severe and recurrent droughts could diversify their income by having some household members migrate while others remained in their region of origin²⁸⁰.

Various studies have recognised that migration is already used as a household response to diversify income streams and secure livelihoods when faced with deteriorating environmental conditions²⁸¹. In Kenya, migration helped households experiencing poor soil quality and reduced agricultural yields to diversify their income, while a case study in Burkina Faso in the 1970s found that short-term, rural-rural migration was a widespread response to drought. In Vietnam, migration was a response to floods which destroyed crops²⁸². The recently released Foresight Report acknowledges that the ability of community members "to obtain *different* income streams from *different* locations greatly increases the longer-term resilience of individuals and communities alike to the threats of environmental change"²⁸³.

Aside from being transactions between individual migrants and their families, remittances have indeed also supported entire communities of origin, supporting public infrastructure and funding

²⁷⁸ C. Tacoli, 'Crisis or adaptation? Migration and climate change in a context of high mobility', 21 *Environment and Urbanization* 2, 2009, p. 520.

²⁷⁹ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 8, 22.

²⁸⁰ M. Ezra and G.-E. Kiros, 'Rural Out-migration in the Drought Prone Areas of Ethiopia: A Multilevel Analysis', 35 *International Migration Review* 3, 2001, p. 749-771; F. G. Renaud, O. Dun, K. Warner and J. Bogardi, 'A Decision Framework for Environmentally Induced Migration', in 49 *International Migration* S1, June 2011, pp. e1-e249, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, p. e10.

²⁸¹ See for example J. Barnett and W.N. Adger, 'Climate Change, human security and violent conflict', 26 *Political Geography* 6, 2007, p. 642-643.

²⁸² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 12.

²⁸³ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 175.

education. Remittances can even contribute to financing innovation, in particular in the agricultural sector of areas affected by environmental degradation. The impact of remittances on development and adaptation to climate change should not be underestimated, as their volume has proved to be double the volume of official development assistance²⁸⁴.

Furthermore, it has been proved that migration caused by environmental degradation will mostly be internal, or across borders of neighbouring countries. In other words, environment-induced migrants often end up in places which are also under environmental pressure, or experience social and political threats. Moreover, as discussed in the previous Chapter, environmental degradation also limits people's capacity to move, leaving the most vulnerable populations "trapped" in a degraded environment which can no longer support their survival. By specifically targeting international, long-distance migration programmes to vulnerable communities affected by environmental disasters, the most vulnerable persons could be enabled to leave their destructed environment, temporarily or permanently²⁸⁵. When people have no option to migrate in a safe and humane manner in response to worsening environmental conditions, they are more likely to migrate in an illegal, unsafe and unplanned way, or even risk becoming forcibly displaced²⁸⁶. Thus, facilitating legal migration for environmental reasons is even a way to prevent the forced displacement of those persons, and the suffering it generates²⁸⁷. If environment-induced migration is managed effectively, humanitarian crises could be minimised, and conflicts avoided.

Moreover, migration out of areas affected by recurring natural disasters reduces the amount of individuals exposed to the disaster, and provides the area with an income stream that usually increases after a disaster has occurred²⁸⁸. In this sense, migration of some family members acts as a sort of "insurance strategy" for poor households, as remittances tend to increase in response to

²⁸⁴ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 22.

²⁸⁵ P. Boncour, 'The Moment of Truth: Adapting to Climate Change', *Migration* Autumn 2009, IOM, Geneva, available at: http://publications.iom.int/bookstore/free/migration_autumn_09.pdf, p. 4.

²⁸⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 9, 13.

²⁸⁷ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, 25-26.

²⁸⁸ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 40; F. Laczo and E. Collett, 'Assessing the Tsunami's Effects on Migration', Feature Story on Migration Information Source, Migration Policy Institute, 2005, available at: <http://www.migrationinformation.org/USfocus/display.cfm?id=299>.

environmental shocks. As for international migration, the relevance of such an insurance strategy has been illustrated by the growth of international remittances in the aftermath of Hurricane Gilbert in Jamaica and rainfall shock-related income losses in the Philippines²⁸⁹. The diasporas often also act as a shelter network in case of disaster-induced temporary displacement²⁹⁰. Finally, it has even been argued that migration out of environmentally-vulnerable regions is a way to relieve pressure on those areas, as it reduces the demands on resources. Migration might even help to slow down the process of environmental degradation and allow those left behind to adapt their livelihood provision to changing ecosystem services²⁹¹.

During the past decades, more and more scholars have recognised this important role of migration as a strategy to adapt to a changing environment. One of the most important conclusions of the Foresight Report reads as follows:

“The key message of this report is that migration in the face of global environmental change may not be just part of the ‘problem’ but can also be part of the solution. In particular, planned and facilitated approaches to human migration can ease people out of situations of vulnerability”²⁹².

However, it is important to note that migration is not always a positive and proactive strategy for adaptation. Whether or not migration acts as a positive adaptation response depends, among other things, on the vulnerability of the household and its sensitivity to climatic changes. The UNU-EHS project “Where the Rain Falls: climate change, food and livelihood security, and migration” reveals that the more resilient households, with more access to a variety of adaptation alternatives and livelihood diversification through education, social networks, and community or government support programmes, use migration to reduce their exposure to climatic variability and enhance their resilience²⁹³. Young single men often migrate temporarily, to cities or other countries, and send

²⁸⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 21.

²⁹⁰ J. Barnett and M. Webber, ‘Accommodating Migration to Promote Adaptation to Climate Change’, A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 22, 26.

²⁹¹ T. Acketoft, ‘Environmentally Induced Migration and Displacement: A 21st Century Challenge’, Report of the Committee on Migration, Refugees and Populations, Council of Europe Parliamentary Assembly, Doc. 11785, 23 December 2008, p. 10; J. Barnett and M. Webber, ‘Accommodating Migration to Promote Adaptation to Climate Change’, A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009.

²⁹² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 10.

²⁹³ K. Warner, T. Afifi, K. Henry, T. Rowe, C. Smith and A. De Sherbinin, ‘Where the Rain Falls: climate change, food and livelihood security, and migration’, An 8 country study to understand rainfall, food security and

remittances to their families. Those households even invest those remittances in other forms of livelihood diversification, education and health. On the other hand, the more vulnerable households, with few or no livelihood diversification options and less assets and education, often do not succeed in their attempt to manage their risk through migration. Often, they use migration as an “erosive coping strategy”, “a matter of human security”, or a survival strategy when hunger has already hit them²⁹⁴.

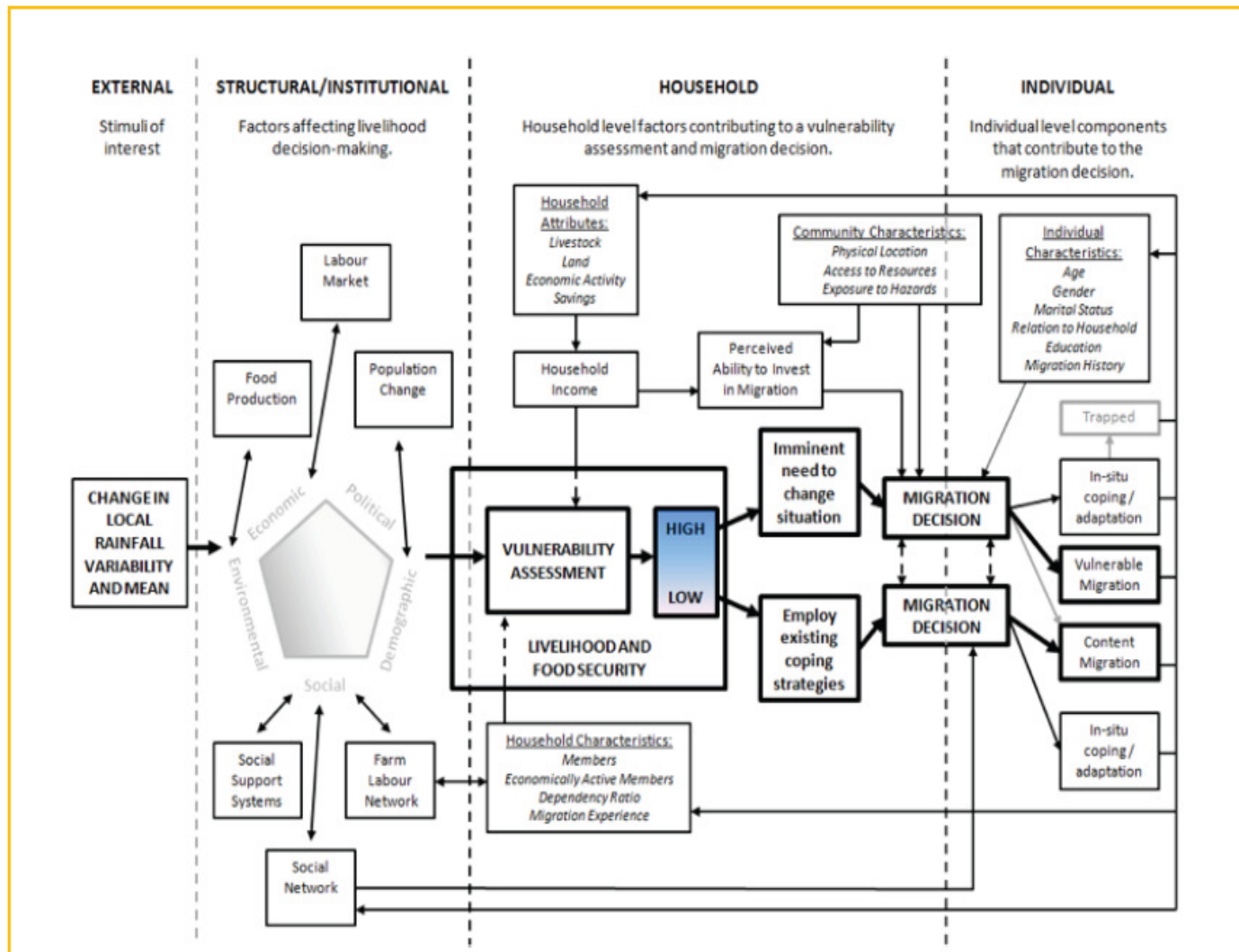
The figure²⁹⁵ below shows the overall conceptual model for the “Where the Rain Falls”-research project. The study, carried out by UNU-EHS and Care International in eight countries in Asia, Africa and Latin America, projects that rainfall variability, representing the impact of climate change in the studied rural areas, will force more and more people to migrate as food becomes scarcer²⁹⁶. Moreover, the report describes that the most vulnerable households are often trapped, and do not have the capacity to migrate.

human mobility, Summary of the Global Report, United Nations University Institute for Environment and Human Security (UNU-EHS) and Care International, November 2012, available at: <http://www.ehs.unu.edu/file/get/10587.pdf>, p. 5.

²⁹⁴ ‘Climate change: migration not always a way to adapt’, *IRIN Humanitarian News and Analysis*, 28 November 2012, available at: <http://www.irinnews.org/report/96917/climate-change-migration-not-always-a-way-to-adapt>.

²⁹⁵ K. Warner, T. Afifi, K. Henry, T. Rawe, C. Smith and A. De Sherbinin, ‘Where the Rain Falls: climate change, food and livelihood security, and migration’, An 8 country study to understand rainfall, food security and human mobility, Summary of the Global Report, United Nations University Institute for Environment and Human Security (UNU-EHS) and Care International, November 2012, available at: <http://www.ehs.unu.edu/file/get/10587.pdf>, p. 4.

²⁹⁶ K. Warner, T. Afifi, K. Henry, T. Rawe, C. Smith and A. De Sherbinin, ‘Where the Rain Falls: climate change, food and livelihood security, and migration’, An 8 country study to understand rainfall, food security and human mobility, Summary of the Global Report, United Nations University Institute for Environment and Human Security (UNU-EHS) and Care International, November 2012, available at: <http://www.ehs.unu.edu/file/get/10587.pdf>, p. 8.



Thus, in order for migration to become an accessible adaptation strategy instead of a last resort for vulnerable communities affected by environmental degradation, it is important for policymakers not only to passively allow migration, but also to actively facilitate and support such processes. One of the challenges is to make migration work as an adaptation strategy for the most vulnerable populations. According to the project's researchers, "understanding the circumstances and factors that shape household migration choices can help policymakers create enabling environments that allow people to adapt to a changing climate and to access migration as a resilience-enhancing strategy, rather than an erosive survival strategy"²⁹⁷. Whether or not international adaptive

²⁹⁷ K. Warner, T. Afifi, K. Henry, T. Rowe, C. Smith and A. De Sherbinin, 'Where the Rain Falls: climate change, food and livelihood security, and migration', An 8 country study to understand rainfall, food security and human mobility, Summary of the Global Report, United Nations University Institute for Environment and Human Security (UNU-EHS) and Care International, November 2012, available at: <http://www.ehs.unu.edu/file/get/10587.pdf>, p. 8.

migration is an option when faced with environmental degradation thus depends on the opportunity to migrate in a humane and legal way (*see further in PART III*), as well as on the balance between the costs and benefits of migration.

1.2. The “costs and benefits” of international adaptive migration

Various studies have showed that policies to prevent migration in the context of environmental changes are often ineffective. Measures to limit migration have in the past repeatedly proven to be unsuccessful, and, more importantly, they may render a population even more vulnerable to the effects of environmental changes, as they prevent affected people to leave a degraded environment²⁹⁸. Moreover, as migration is now recognised as an important strategy for households and communities to diversify their income in the face of environmental degradation, limiting human mobility can take an important source of livelihood diversification away at a time when it is most needed. According to the Foresight Report, reduced options for adaptive migration might even make it impossible for affected households to remain in their region of origin, and thus lead to a much larger out-migration in an unplanned and vulnerable way, or to situations where people are forcibly displaced due to environmental distress²⁹⁹. Instead, facilitating adaptive migration for those communities who can benefit from it when faced with environmental degradation, has much more positive impacts. When migration is a voluntary coping strategy instead of a last resort, allowing people to weigh their alternatives, migrants can not only reduce their risk to environmental disruptions, but also that of their households and communities³⁰⁰.

In order to support international migration as a valid response to changing environmental conditions, a radical change of policy is necessary. Instead of taking a restrictive approach towards international migration and regarding migration as a failure of adaptation, policymakers at the national and international level should support and facilitate international adaptive migration as an important

²⁹⁸ J. Sward and S. Codjoe, ‘Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)’, Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf.

²⁹⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 17.

³⁰⁰ S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 399.

coping and development strategy. As climate change will increasingly motivate people to search for a livelihood elsewhere, there is a need to broaden the options for legal migration for environmentally-affected vulnerable communities. In doing so, policy responses should focus on maximising the benefits of migration, and minimising its costs for all the stakeholders involved in the migration experience.

It is often argued that international adaptive migration might provide a “win-win-win”-outcome, as it entails benefits for the migrants themselves when they are faced with environmental disruptions, as well as for the countries of origin and destination. Although the words “win-win-win” are considered as a quite controversial expression in the context of international migration - should destination countries aim to “win” from migration from vulnerable communities? Is there really a “win” for people whose region of origin is no longer inhabitable -, the idea is to promote adaptive migration in the context of environmental changes by pointing at the benefits of the concept for all the stakeholders involved.

In order to facilitate international adaptive migration, it is firstly necessary to remove some of the practical, financial, social and legal barriers to international movement. Possible beneficiaries of a migration programme need in the first place information on where to go, how to make a living, which rights and entitlements they have, etc.³⁰¹. Furthermore, the financial barriers (costs of transport, housing, transferring remittances,...) need to be taken away. Migrants and their families also need support in reducing their separation distress. Moreover, in order to contribute to the economic growth and adaptive capacity of host and home communities, migration and development policies should be harmonised. Various studies have showed that international migration schemes might benefit countries with demographic deficits. It is for example expected that by 2050, the amount of working age citizens in the EU will have been reduced from four to only two for each citizen aged 65 or above³⁰². While on the one hand, these gaps in the labour markets of developed countries could be filled by accommodating migration from vulnerable communities affected by environmental degradation, on the other hand, migration also contributes to the socio-economic growth of those

³⁰¹ J. Barnett and M. Webber, ‘Accommodating Migration to Promote Adaptation to Climate Change’, A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 16.

³⁰² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 22.

communities³⁰³. Such a coherent linkage of development, environmental and migration policies represents a comprehensive solution to deal with environment-induced population movements.

International migration is of course not without costs, both for the migrants themselves, as for the communities of origin and of destination. There is however a wide range of possibilities to reduce the risks associated with adaptive migration. As migrants are often in vulnerable positions, subject to exploitation and discrimination, it is important to ensure them equal rights and entitlements than local workers. The extent to which migrants and their communities benefit from the migration experience, depends for a large part on these entitlements, including access to health care and education, political and economic freedoms, and the right to move in and out of the host country. Migration also needs to be carefully planned and organised to ensure that migrants do not become even more vulnerable. Migrants furthermore require practical assistance to reduce the costs of migration, including assistance with the visa procedure, housing, public services, and integration in the host community³⁰⁴.

Another often raised concern in the context of international (labour) migration is the risk of brain drain for the country of origin. Mass emigration of skilled people might even diminish a country's adaptive capacity. The risk of brain drain can however be reduced by facilitating the circularity of migrants, for example by allowing them to move freely between host and home countries. When migrants are encouraged to return to their native countries, temporarily or permanently, they can become "agents of change", bringing knowledge on climate change adaptation and disaster risk reduction, and transferring money and skills. Host countries can furthermore invest in the up-skilling of communities of origin, which would then create opportunities for the transfer of remittances³⁰⁵.

As for those remittances, a World Bank study on the Middle East and North Africa (MENA) region and South Asia, discovered that the likelihood of receiving remittances and the amount received is lower in poor areas, mainly because of the lower possibility of the population to migrate. Moreover, in the poorest areas, the received remittances are mostly used for survival, while in richer areas, they are

³⁰³ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 30-32.

³⁰⁴ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 42.

³⁰⁵ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 31.

more often used for long-term investments, such as education³⁰⁶. It is therefore important that policies to facilitate and support the linkage between migration and adaptation address the fact that remittances do not tend to reach households in poorer areas. They should also help migrants to optimise the relevance of their remittances for the development and adaptation of their communities of origin. For instance by reducing the cost of remittance transfers, the merits of migration for the migrants' families and communities of origin can be maximised³⁰⁷.

2. ILLUSTRATIONS OF INTERNATIONAL ADAPTIVE MIGRATION

In order to analyse exactly how international migration can be facilitated for certain communities affected by environmental disruptions, some lessons can be learned from existing migration programmes. A number of projects can serve as concrete illustrations of how international mobility can act as an adaptation strategy for vulnerable populations, and enable local communities to increase their resilience towards environmental changes.

This Section will look at lessons emerging from micro-situations, and assess whether they are appropriate to be implemented at the macro-level. A case study of the Temporary and Circular Labour Migration (TCLM) programme between Colombia and Spain illustrates how a European Member State can offer environmentally vulnerable people a livelihood alternative by enabling them to temporarily migrate overseas (2.1)³⁰⁸. Other concrete examples of adaptive migration are briefly addressed in Section 2.2.

³⁰⁶ P. Brückner, N. Bougnoux and Q. Wodon, 'Migrations environnementales en Afrique du Nord et au Moyen-Orient', *Policy Brief* N° 13/12 September 2012, IDDRI SciencesPo, Paris, available at: http://www.iddri.org/Publications/Collections/Syntheses/PB1312_PB%20NB%20QW_migrations%20MENA.pdf; G. Joseph, Q. Wodon, A. Liverani and B. Blankespoor, 'Is Climate Change Likely to Lead to Higher Net Internal Migration in Yemen?', The World Bank, Washington, November 2011, available at: http://www.diwdc.org/files/GDD_2011/Session%20B_Yemen%20Migration%20Prediction.pdf.

³⁰⁷ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 30-45.

³⁰⁸ This case study draws upon an earlier published book contribution: N. de Moor, 'Temporary Labour Migration for Victims of Natural Disasters: The Colombia-Spain Model', in M. Leighton, X. Shen and K. Warner (eds.), *Climate Change and Migration: Rethinking Policies for Adaptation and Disaster Risk Reduction*, SOURCE nr. 15/2011, Publication Series of UNU-EHS, April 2011, p. 92-103.

2.1. Temporary and Circular Labour Migration (TCLM) programme between Colombia and Spain

The Temporary and Circular Labour Migration (TCLM) programme has been discussed by various authors in the context of environmental change and migration³⁰⁹. Through this innovative migration model, Colombians facing recurring natural disasters are said to be offered an alternative livelihood through temporary work abroad, while the affected regions of origin can recuperate. By supporting migrants in maximising the impact of remittances on the recovery of their place of origin, the TCLM programme indeed increases their resilience to environmental disruptions.

The focal point of this case study lies on temporary and circular migration³¹⁰. In the context of environment-induced migration, *circular* migration has some additional advantages. By maintaining linkages between migrants and their countries of origin, circular migration turns migrants into agents for development. For the host country, it has the advantage of reducing the social and political costs of immigration, as circular migrants return to their country of origin. Similarly, the latter does not have to deal with permanent emigration, hollowing out its economy³¹¹. In this sense, circular migration offers a more durable solution for certain regions affected by environmental degradation. In particular in case of land degradation and desertification, temporary, circular and seasonal migration are recognised as important strategies of income diversification. Where people heavily rely on rain-fed agriculture, circular migration acts as an effective strategy to react to recurring droughts

³⁰⁹ See for example R. Engelman, 'The State of World Population 2009: Facing a Changing World: Women, Population and Climate Change', United Nations Population Fund (UNFPA), 2009, available at: http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf, p. 36; T. Rinke, 'Temporary and Circular Labor Migration between Spain and Colombia', in F. Gemenne, P. Brückner and D. Ionesco, *The State of Environmental Migration 2011*, IDDRI SciencesPo and the International Organisation for Migration (IOM), Study November 2012, Paris, 2012, available at: <http://www.iddri.org/Publications/The-State-of-Environmental-Migration-2011>; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010.

³¹⁰ Circular migration as a pattern of human mobility is a migration model giving migrants the opportunity to move back and forth between home and host countries, often with mutually beneficial policy goals.

³¹¹ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010; A. Deprez, 'Climate Migration in Latin America: A Future 'Flood of Refugees' to the North?', Part 2: 'Hotspot Case Study: Mexico', Analysis prepared by COHA Research Fellow Alexandra Deprez Blog post of the Council on Hemispheric Affairs, Posted 26 Feb 2010, available at: <http://www.coha.org/climate-migration-in-latin-america-a-future-%E2%80%98flood-of-refugees%E2%80%99-to-the-north-part-2/>, 2010.

and changes in rain patterns³¹². With existing migration patterns in mind, it is to be expected that temporary and circular migration will increasingly become crucial coping strategies to deal with slow-onset environmental degradation in the future.

2.1.1. The origin of the TCLM project

During the past decades, Spain often encountered a lack of seasonal labour forces. Since the 1990s, the Unión de Pagesos, the main agricultural trade union from the Spanish region Catalonia, has been organising and supporting the recruitment of foreign seasonal workers in order to respond to its members' needs. In 2001, the Unión de Pagesos initiated a Temporary Circular Labour Migration project, facilitating seasonal migration from Colombia, Morocco and Romania to Spain, in order to solve a shortage of labour forces for harvesting fruit in Catalonia³¹³. The initial project offered logistical assistance in the recruitment process (selection of the workers, travel arrangements, visa procedure, etc.), and supported the workers during their stay in Spain, informing them on available facilities and services, the host region, the healthcare system and the local culture. What makes the Unión de Pagesos stand out from other trade unions, is its focus on co-development. The Unión de Pagesos recognises for example the potential benefits of migration for development and adaptation to environmental changes. Together with the Fundació Pagesos Solidaris (FAS)³¹⁴, its foundation, the

³¹² C. Tacoli, 'Crisis or adaptation? Migration and climate change in a context of high mobility', 21 *Environment and Urbanization* 2, 2009, p. 520-521.

³¹³ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', 2012 *International Journal of Population Research*, available at: <http://www.hindawi.com/journals/ijpr/2012/498158/cta/>, p. 5; International Organisation for Migration (IOM), 'Enhancing Development in Colombia through Temporary and Circular Labour Migration', IOM Webpage, available at: <http://www.iom.int/cms/en/sites/iom/home/what-we-do/labour-migration/enhancing-development-in-colombi.html>; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', 2012 *International Journal of Population Research*, available at: <http://www.hindawi.com/journals/ijpr/2012/498158/cta/>;

N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009.

³¹⁴ Foundation for Peasant Solidarity.

Unión de Pagesos therefore provides training courses for migrants, with the aim of creating opportunities and productive processes in the country of origin³¹⁵.

Recurring environmental disruptions, together with a long lasting conflict, have displaced many Colombians. When in 2006 the Galeras volcano in south-west Colombia erupted, the TCLM programme, which targets different vulnerable communities, was used to provide a migration opportunity for thousands of affected people. This programme allowed them to temporarily migrate to Spain, where they could earn an income in seasonal harvest. Afterwards, the programme was also expanded to rural populations, whose crops and land are particularly vulnerable to floods, droughts and other environmental disruptions. During their working period in Spain, the temporary migrants acquired knowledge and skills to diversify their income upon return to Colombia. In this way, they could reduce their vulnerability to environmental disruptions, without being forced to permanently relocate. Furthermore, their absence allowed the recovery of their fragile land³¹⁶.

In 2007 the IOM joined the TCLM programme, with the aim of strengthening it, and making it replicable. The IOM also wanted to promote certain targeted communities to benefit from the programme³¹⁷. Thanks to funding of the European Commission's AENEAS programme³¹⁸, the IOM expanded the initial programme, increasing the number of beneficiaries and the number of Spanish employers taking part. The organisation also provided technical assistance to national institutions developing a migration policy and legislation³¹⁹. While the Unión de Pagesos had initiated the

³¹⁵ R. Engelman, 'The State of World Population 2009: Facing a Changing World: Women, Population and Climate Change', United Nations Population Fund (UNFPA), 2009, available at: http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf, p. 36; N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 33.

³¹⁶ R. Engelman, 'The State of World Population 2009: Facing a Changing World: Women, Population and Climate Change', United Nations Population Fund (UNFPA), 2009, available at: http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf, p. 36; 'Fleeing Disaster Can Be a Good Thing', *IRIN Humanitarian News and Analysis*, 30 March 2010, available at: <http://www.Irinnews.Org/Report.aspx?Reportid=88627>.

³¹⁷ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 17.

³¹⁸ The 2004-2006 AENEAS programme is now succeeded by the 'Thematic programme for cooperation with third countries in the areas of migration and asylum'. See for more information on: http://ec.europa.eu/europeaid/how/finance/dci/migration_en.htm.

³¹⁹ International Organisation for Migration (IOM), 'Enhancing Development in Colombia through Temporary and Circular Labour Migration', IOM Webpage, available at: <http://www.iom.int/cms/en/sites/iom/home/what-we-do/labour-migration/enhancing-development-in-colombi.html>.

programme as an opportunity for economic welfare and development, the IOM added the perspective of 'migration management', as required by the AENEAS programme³²⁰.

2.1.2. Goal of the TCLM programme

The TCLM programme offers Colombian workers the possibility to work in Catalonia doing seasonal labour for one of the employers associated with the Unión de Pagesos. The goal of this programme is twofold: firstly, it aims at effectively managing seasonal labour migration. The programme is an answer to Catalonia's demand for low-skilled labour, and is meant to legally regulate labour migration flows. Secondly, and of higher importance for the purpose of this research, the programme also aims at supporting "the generation of wealth in both countries"³²¹. In other words, it wants to enhance the impact of migration on the development of local communities in the countries of origin³²². Since the experience of seasonal migration can provide skills and resources, migrants could be made "innovators and entrepreneurs in their country of origin"³²³. This way, the seasonal worker can not only improve his personal income and social status, but the economic welfare of his home community as well. The idea is to provide the migrants with temporary residence and work permits, in order to allow them to earn a living and acquire knowledge and skills, making them more resilient when returning to Colombia. As for the beneficiaries coming from environmentally-affected regions, the programme offers a temporary income alternative, while the affected regions can recuperate. According to Koko Warner, the TCLM programme is as such "an important source of post-disaster rehabilitation"³²⁴.

³²⁰ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 29.

³²¹ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 28.

³²² International Organisation for Migration (IOM), 'Enhancing Development in Colombia through Temporary and Circular Labour Migration', IOM Webpage, available at: <http://www.iom.int/cms/en/sites/iom/home/what-we-do/labour-migration/enhancing-development-in-colombi.html>.

³²³ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 13.

³²⁴ 'Fleeing Disaster Can Be a Good Thing', *IRIN Humanitarian News and Analysis*, 30 March 2010, available at: <http://www.Irinnews.Org/Report.Asp?Reportid=88627>.

To achieve these ambitious goals, the participating workers need to be well prepared and guided during the whole migration process. Through various training activities the TCLM programme prepares migrants to generate economic and social development in their region of origin. Participating workers are supported in the planning, coordination, formulation and management of community projects, and in the structuring and follow-up of business plans. They are also encouraged to achieve self-sustainability through marketing, services or import/export activities. Moreover, remittances are channelled towards productive initiatives or the purchase of goods improving the socio-economic status of the community of origin. The IOM's local partners are responsible for some of the preparation work in the country of origin, like the selection of the migrant workers, and the identification of job-generating initiatives. In order to reduce the families' separation distress and assist them to earn a livelihood, the migrants' families get support while their relatives are working abroad³²⁵.

2.1.3. Beneficiaries

One of the innovative aspects of a labour migration scheme such as the TCLM programme are the targeted communities in the country of origin, and the way of selecting beneficiaries. The communities participating in the TCLM programme are extremely heterogeneous: from ex-guerrilla fighters over vulnerable and displaced communities and indigenous groups to single mothers and people from high-risk zones of natural disasters. In 2007, 1.519 migrants participated in the programme, while 1.400 participated in 2008³²⁶.

The selection criteria vary slightly from community to community depending on the local partners involved, and the features of the communities. The IOM has identified some specific target populations, and IOM's local partners take care of the pre-selection of the migrants. In order to strengthen the development impact of the programme, an important selection criterion is the

³²⁵ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 32-33.

³²⁶ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 29.

migrant's community involvement. The loyalty and strong link of the workers with their communities of origin is also considered to be a discouragement to leave the TCLM programme³²⁷.

Of particular interest for this research, are the communities selected with the aim of 'relocating' people from zones at high risk of natural disasters (mainly volcanic areas), offering them the opportunity to earn a livelihood through the TCLM programme. As for people affected by environmental disruptions, the TCLM programme was originally conceived to offer a livelihood alternative to families affected by the eruption of the Galeras volcano. As discussed above, the programme was later expanded to include also other environmentally-vulnerable communities.

2.1.4. Legal framework supporting the TCLM programme

An innovative migration model such as the TCLM programme can only work when it is sustained by a solid legal framework, allowing for temporary and circular migration. Bilateral agreements between countries of origin and destination can support such migration projects, as well as agreements signed by the EU with third countries. Obviously, a strong national migration legislation is a *conditio sine qua non* for any migration programme. After briefly discussing a bilateral agreement between Spain and Colombia, that forms the backdrop to Spain's establishment of the TCLM programme, this Section covers in particular the Spanish procedures and conditions for the migration of third-country nationals for the purpose of seasonal work.

2.1.4.1. Bilateral agreement between Spain and Colombia

In order to manage international migration, EU Member States conclude agreements with third countries. Besides facilitating the management of migration flows, simplifying the selection of foreign workers and establishing rights and obligations of migrants, those agreements often include measures to fight irregular migration and to facilitate the return of irregular migrants. Recent trends in agreements with third countries reflect a move away from the traditional migration policy-making

³²⁷ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 8.

in the EU, increasingly associating migration policy with other policy areas, such as development aid and external relations.

In order to regulate migration flows, Spain has signed bilateral migration agreements with a number of third countries. In 2001, the first 'recruitment agreement' was signed with Colombia³²⁸. Later, agreements followed with, among others, Romania, Bulgaria, Morocco, Poland, Senegal, Ecuador and Peru³²⁹. Most of the agreements focus on labour migration: they regulate the recruitment process, the issuance of residence and work permits, the rights and obligations of foreign workers, and the transfer of entitlements acquired in each country³³⁰. Specific about the agreement with Colombia, is that this agreement refers to co-development and the development impact of migrants' remittances. This provision was suggested by the Unión de Pagesos, and has not been repeated in any other bilateral agreement between Spain and third countries³³¹. The agreement obliges the parties to take measures to encourage the reintegration of Colombian migrants, with the migration experience as a factor of economic, social and technological development³³². Supported by this agreement, the Unión de Pagesos later established the TCLM programme.

2.1.4.2. National migration law

The national legal basis of the TCLM programme is covered by the *Ley Organica* (Organic Law) on rights and freedoms of foreigners in Spain and their social integration³³³. The procedure for the

³²⁸ Aplicación provisional del Acuerdo entre España y Colombia relativo a la regulación y ordenación de los flujos migratorios laborales, hecho en Madrid el 21 de mayo de 2001 (Agreement between Spain and Colombia on the Regulation and Organization of Migratory Flows for Employment, signed in Madrid on 21 May 2001), *Boletín Oficial del Estado (Official State Bulletin)* n° 159 de 04/06/2001.

³²⁹ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 493; J.J. Vergé Oms, 'Planned Migration', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 12-13.

³³⁰ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 497-498.

³³¹ J.J. Vergé Oms, 'Planned Migration', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 12-13.

³³² International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 497-498.

³³³ Ley Orgánica n° 4/2000 de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Organic Law n° 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and

recruitment of foreign workers is covered by the *Reglamento de Extranjería* (Immigration Rules), which could, at the time of the development of the TCLM programme, be found in Real Decreto 2393/2004³³⁴. This legislation is of course subject to EU and international legislation, and to the bilateral agreements signed between Spain and third countries. With the exception of some “hard to fill vacancies”, Spanish legislation only allowed to hire non-resident third-country nationals in accordance with a quota system for foreign workers³³⁵. The Spanish government determined a yearly quota for migrant workers who could enter the country, considering the economic situation, and the interests of various stakeholders³³⁶. The quota, which could be modified throughout the year, was established for 3 categories of migrant workers: permanent workers, temporary workers and job seekers.

As for seasonal workers, the Royal Decree 2393/2004 enumerated the sectors where migrants could be employed³³⁷. Seasonal labour migration was allowed for a maximum period of 9 months within 12 consecutive months³³⁸. The quota for seasonal workers was mainly reserved for those countries having signed a bilateral agreement with Spain, including Colombia³³⁹. The bilateral agreement with Colombia installed a fast track system for seasonal migrants, with the support and supervision of IOM Colombia and the Unión de Pagesos. On the basis of the bilateral agreement, Spain introduced a temporary visa, the T Visa, valid up to 9 months.

their social integration), *Boletín Oficial del Estado (Official State Bulletin)* n° 10 de 12/01/2000, Consolidated Version published on 29/06/2013 (hereafter: Ley Orgánica n° 4/2000); R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unión de Pagesos, 2010, p. 52-53.

³³⁴ Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Royal Decree 2393/2004 of 30 December 2004, which approves Regulation of Organic Law 4/2000, of 11 January 2000, on Rights and Freedoms of Foreigners in Spain and Their Social Integration), *Boletín Oficial del Estado (Official State Bulletin)* N° 6 of 7 January 2005, p. 485-539 (hereafter: Real Decreto 2393/2004).

³³⁵ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 492.

³³⁶ Article 39 of the Ley Orgánica n° 4/2000; Articles 77-80 of the Real Decreto 2393/2004.

³³⁷ Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Royal Decree 2393/2004 of 30 December 2004, which approves Regulation of Organic Law 4/2000, of 11 January 2000, on Rights and Freedoms of Foreigners in Spain and Their Social Integration), *Boletín Oficial del Estado (Official State Bulletin)* N° 6 of 7 January 2005, p. 485-539 (hereafter: Real Decreto 2393/2004).

³³⁸ Article 55 of the Real Decreto 2393/2004.

³³⁹ Article 42 of the Ley Orgánica n° 4/2000; N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 73.; International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 494.

An important feature of the Spanish legislation was the concept of recruitment in the country of origin. Workers had to pass a selection in their country of origin, with priority given to states which have signed a bilateral migration agreement with Spain³⁴⁰. After verification that no workers already residing in Spain were willing to accept a particular job, employers could request to employ a foreign worker. In the consular offices, foreigners could then subscribe to lists with available vacancies, prepared by the Public Service of State Employment³⁴¹. Once approved, the employment contract was signed by the worker in the Spanish consulate abroad. Afterwards the worker was issued a temporary work visa he/she could enter the Spanish territory with³⁴².

Several requirements were to be met in order to issue a residence and work permit. Firstly, a labour market test verified if the vacancy could not be filled by a Spanish worker, before allowing the recruitment of a migrant worker. For seasonal migration however, no formal labour market test was required³⁴³. Furthermore, the employer had to provide adequate accommodation, make travel arrangements, and register the migrant worker within the Spanish social security system³⁴⁴. The worker also had to agree to return to his country of origin at the end of his employment in Spain, and had to go to the Spanish consulate within one month after his return. Non-compliance could limit his possibility to work in Spain in the future³⁴⁵. Moreover, after two years of seasonal labour in Spain, and subsequent returns to the country of origin, the migrants benefited from an exception to the labour market test³⁴⁶. Compliance with the obligation to return could thus lead to priority to be engaged in permanent employment in Spain.

The Spanish migration legislation allowed for some flexibility, with the possibility to request an extension of the temporary residence permit, of up to a maximum of 9 months. Furthermore, seasonal migrants could work for several employers during this time limit of 9 months within a

³⁴⁰ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 493.

³⁴¹ Article 50 of the Real Decreto 2393/2004.

³⁴² N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 72.

³⁴³ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 494.

³⁴⁴ Article 56 of the Real Decreto 2393/2004.

³⁴⁵ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 71.

³⁴⁶ Article 40, k of the Ley Orgánica n° 4/2000; International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 494.

period of twelve consecutive months³⁴⁷. The T visa allowed migrant workers to move from one employer to another. As the agricultural sector requires some flexibility, this is very useful. Some harvests require quick shifts of workers, and have a temporary character.

However, in response to changes in the demands of the domestic labour market, as a result of the economic crisis that hit Spain quite severely, the Spanish immigration legislation was recently amended. The *Reglamento de Extranjería* (Immigration Rules) can now be found in Real Decreto N° 557/2011³⁴⁸. Overall, the requirements for receiving a work permit for low-skilled workers have become considerably stricter. Such a change of legislation, as well as the reasons thereto, need to be taken into account when discussing the consolidation and possible replication of the TCLM programme in other countries (*see further below in Section 2.1.6.*).

2.1.5. Potential for development and resilience building

In many European countries, the link between migration and development has not been recognised, whereas Spain has introduced the concept of co-development into its migration policy. The *Plan Estratégico de Ciudadanía e Integración* (Strategic Plan for Citizenship and Integration) 2007-2010 from the Ministry of Work and Social Affairs “aims at identifying and promoting development opportunities for the countries of origin while incorporating co-development strategies in the process of integrating migrants”³⁴⁹. The Plan emphasises the importance of cooperation among local governments in the country of origin and destination and on channelling remittances towards productive initiatives.

The potential of adaptive migration for migrants and their families, the community of origin and the country of destination has been described as a “win-win-win” outcome³⁵⁰. By assessing the benefits

³⁴⁷ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 77.

³⁴⁸ Real decreto N° 557/2011, de 20 de Abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, *Boletín Oficial del Estado (Official State Bulletin)* N° 103 of 30 April 2011.

³⁴⁹ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 72-73.

³⁵⁰ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', 2012 *International Journal of Population Research*, available at: <http://www.hindawi.com/journals/ijpr/2012/498158/cta/>, p. 1

of the TCLM programme, it could be examined whether such as triple-win outcome is indeed possible in the context of environment-induced human mobility.

There is a wide agreement that the TCLM programme impacts positively on the country of destination. The programme allowed to fill gaps in the Spanish labour market in a flexible way, without having to accept migrants on a permanent basis³⁵¹. Even though the economic crisis has diminished the need for foreign low-skilled workers, it is generally agreed that there will be again a need for labour migration in the future. Secondly, the circular migration experience clearly benefits the participating migrants, as they are offered the possibility to earn a livelihood abroad, allowing them to send remittances to their families. The impact of the programme is even bigger if they are able to acquire new skills and learn from their experience abroad. These 'social remittances' can help the beneficiaries to diversify their income upon their return home³⁵². It can even help the migrants to increase their resilience to environmental disruptions, and it gives them an alternative to permanent, urban and/or forced migration.

A more challenging question however is whether the TCLM programme also benefits the migrants' region of origin. During the absence of the migrant workers, environmentally fragile land can recover, allowing marketable crops to start growing again³⁵³. According to Magri, the TCLM programme furthermore has the potential to generate development in Colombia, mainly through income generating activities creating employment opportunities. Due to their strong commitment and loyalty with their home communities, the participants attached great importance to the development impact of the programme. Through interviews with participants, it has been shown that many of them had plans to start a business³⁵⁴. Since the TCLM programme in itself is insufficient to solve Colombia's unemployment problem, income generating activities are regarded as a tool to generate jobs for the home community. However, as too little time has passed since the project was introduced, it is not clear yet whether the programme has indeed increased the possibility of implementing productive initiatives in the long term.

³⁵¹ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 52-54.

³⁵² R. Engelman, 'The State of World Population 2009: Facing a Changing World: Women, Population and Climate Change', United Nations Population Fund (UNFPA), 2009, available at: http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf, p. 36.

³⁵³ R. Engelman, 'The State of World Population 2009: Facing a Changing World: Women, Population and Climate Change', United Nations Population Fund (UNFPA), 2009, available at: http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf, p. 36.

³⁵⁴ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 54-56.

The co-development goal of the TCLM programme is supported by the local governments in Colombia. Together with social workers and the FAS, they assist the workers and their families in the channelling of remittances towards productive initiatives in the region of origin, and help them to develop job-generating projects. However, research has also shown that returned migrants often lacked sufficient capital and expertise in order to start their own business. Although their goal was to reduce the unemployment and increase the resilience of their home communities, most of their first Spanish salary was used to pay off debts, improve their own living conditions and pay for education. Aside from a lack of capital, returning migrants willing to start a business often suffered from a lack of expertise. Even though the migrants had learned from their experiences in Spain and from the training they had received, they still lacked the knowledge to deal with bureaucratic and technical issues when starting up a business. Therefore, it should be recommended to provide more professional and technical support in developing and implementing business plans in order to accomplish the programme's development goal³⁵⁵.

2.1.6. Conditions for replication of the TCLM programme

Another interesting question to examine is whether the TCLM programme could be implemented in other EU Member States. As the European Commission proposes the programme as a “best practice”³⁵⁶, it is interesting to investigate the possibility to copy this model, taking national specificities into consideration. Since the TCLM programme has been designed to tackle some of the concerns that have been raised on temporary and circular migration programmes, certain features of the project should indeed be taken into account for a successful introduction of international adaptive migration into European migration law and policy.

Firstly, the political, economic and institutional context of the host region is decisive for the implementation of any labour migration programme. The political will to support temporary labour

³⁵⁵ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', 2012 *International Journal of Population Research*, available at: <http://www.hindawi.com/journals/ijpr/2012/498158/cta/>, p. 5-6; N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 59.

³⁵⁶ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 82.

migration with a focus on co-development is imperative for the replication of the TCLM programme. A gap between labour supply and demand in the country of destination is another indispensable factor for a successful labour migration programme. As for the circularity of the movement, seasonal labour migration is furthermore stimulated by an economic sector with a calendar linked to the circularity of the temporary migrant. The TCLM programme was implemented in the Spanish agricultural sector, where there is a large demand for seasonal migrant workers for the harvesting and processing of fruit. In 2006, foreign workers even counted for 74.1 % of the labour forces in this sector³⁵⁷. In addition, a strong employer's organisation, with a coordinating and mobilizing management role, facilitates such a project. Finally, the way in which countries deal with irregular migration and with sanctioning employers hiring irregular migrants, plays a vital role³⁵⁸.

Furthermore, respect for migrants' fundamental rights is a necessary condition for the elaboration of a humane and efficient labour migration policy. The lack of legal protection for temporary migrant workers has often raised criticism in literature³⁵⁹. In order to protect the migrants' rights and reduce their vulnerability, the workers participating in the TCLM programme are informed of their rights prior to their departure. They receive information on the destination and the working conditions, and they are assisted by the FAS Foundation before departure and during their working period in Spain³⁶⁰. Furthermore, only those employers fulfilling certain requirements are selected for the programme. At the international level, the most comprehensive instrument protecting labour migrants is the UN Convention on the Rights of All Migrant Workers and Members of their Families (see above in Chapter I, Section 2.2.3.2), which comprises a comprehensive set of rights for both

³⁵⁷ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 52.

³⁵⁸ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 23-24.

³⁵⁹ S. Castles, 'Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?', *Working Papers* No. 1. International Migration Institute (IMI), University of Oxford, Oxford, 2006, p. 11; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', 2012 *International Journal of Population Research*, available at: <http://www.hindawi.com/journals/ijpr/2012/498158/cta/>, p. 1; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 51.

³⁶⁰ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 28.

regular and irregular migrant workers³⁶¹. However, although the Convention is open for signature by all states in accordance with its Article 86 (1), it has only been ratified by 46 countries, none of which are important destinations for migrant workers³⁶².

A solid national legal framework, allowing third country nationals for temporary labour migration, is another indispensable factor for the replication of the TCLM programme. The conditions and procedures for (seasonal) labour migration vary significantly between EU Member States³⁶³. In order to select the EU Member States where such a model could be replicated, a comparative analysis of their legal and institutional framework is needed. Firstly, replication of the TCLM programme is only possible for those EU Member States that allow for seasonal labour migration for low-skilled workers. Furthermore, the issuance of residence and work permits for third country nationals is in some Member States limited to nationals of certain third countries. In Italy for example, the seasonal quota is mainly reserved for citizens of listed countries, or countries which have signed a cooperation agreement with Italy, aimed at fighting irregular migration and repatriating irregular migrants³⁶⁴. Countries like Spain and Italy, with a large demand for seasonal labour, tend to facilitate seasonal migration through bilateral agreements on migration management with third countries³⁶⁵. Moreover, according to some national legislation, labour migration can only take place within certain quota established by the government. Furthermore, some countries only allow migrant workers to be employed in certain sectors or certain jobs, while others apply a more broad approach regarding the employment of third country nationals. For those countries where labour migration is limited to nationals of certain third countries, the introduction of a TCLM programme would have to be preceded by a cooperation agreement with countries of origin.

Another important aspect is the encouragement of the circularity of migrants in national policy and legislation. In order to reduce the risk of circumvention of the programme and guarantee the return

³⁶¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in New York on 18 December 1990, entered into force on 1 July 2003, 2220 UNTS 3; P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis Iii, Intersentia, Antwerp, 2009.

³⁶² P. Martin and M. Abella, 'Migration and Development: The Elusive Link at the GFMD', 43 *International Migration Review* 2, 2009, p. 433. See for a last update on the ratification process: http://treaties.un.org/Pages/ViewDetails.aspx?mtldsg_no=IV-13&chapter=4&lang=en.

³⁶³ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf.

³⁶⁴ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 73-74.

³⁶⁵ International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 494.

of the temporary workers, the visa that workers in the TCLM programme are granted, is valid for a period of maximum 9 months, and does not allow a change of residence status. At the end of the season, the migrant has to return to Colombia. As discussed above, after compliance with this rule during two years of seasonal work in Spain, the “national employment situation” will not be considered in the application for a permanent work permit³⁶⁶. In order to avoid the programme from acting as an incentive for workers to remain in Spain, participating migrants are also informed on the consequences and risks of an irregular stay in Spain. Moreover, circularity of the migrants is encouraged by the strong expectations of their families and their commitment to the communities of origin. The project therefore focused on beneficiaries demonstrating community involvement and leadership³⁶⁷. Migrants are also encouraged to return by the incentive of being re-invited to Spain during the next working seasons. In order to guarantee the circularity of the participants, it is also important to guarantee that returned migrants can sustain themselves and their families in the country of origin. Otherwise, there would be no incentive to return home³⁶⁸. Programmes to support migrants in this return and reintegration process could thus be an important tool in this context (*see further below in PART III, Chapter VII, Section 3.4.*).

A programme like the TCLM model furthermore requires some flexibility in national migration law. Employers in the agricultural sector, where Colombian beneficiaries were employed, are exposed to sudden changes in production, and need to be able to respond to changes in the demand for workers. Spanish legislation allows for a temporary permit extension, according to changes in the seasonal work planning. This means that employers can choose to employ a person longer than the period that was initially authorised. In some countries, such as Italy, an extension is not possible. Another aspect of legal flexibility is the possibility for a seasonal migrant to work for more than one employer within the allowed time period. In some countries, such an authorisation can even be given after the worker has entered the country. A legal framework allowing for such flexibility is better suited to introduce a seasonal labour migration programme, on the basis of the TCLM model.

Another key to success is the efficiency of the migration procedure. In many countries, the complexity of the procedures for legal employment of temporary workers is one of the main

³⁶⁶ Article 40, k of the Ley Orgánica n° 4/2000; International Organisation for Migration (IOM), *Laws for Legal Immigration in the 27 EU Member States*. International Migration Law N° 16, 2009, available at: http://publications.iom.int/bookstore/free/IML_16.pdf, p. 494.

³⁶⁷ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 8-9, 46.

³⁶⁸ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 58.

obstacles for labour migration. Inefficient procedures even act as a stimulus for employing irregular migrants already residing in the country³⁶⁹. Both the swiftness and reliability of the institutions, in the country of origin as well as in the country of destination, contribute to the effectiveness of the recruitment process³⁷⁰.

Furthermore, the social and psychological impact of the temporary migration on the migrants and their families staying behind has raised some concerns by scholars. The TCLM programme aims to mitigate this impact through workshops aimed at identifying possible situations of family distress or conflict. Social workers not only prepare the worker for the migration experience, but also his family members left behind. Finally, integration in the place of destination is facilitated both through preparatory activities in Colombia, informing the worker on the local community and its cultural context, and through a wide variety of activities in Spain, organised by the Receiving Area of FAS³⁷¹.

Last but not least, it is vital for the TCLM programme to be supported by a national policy linking migration with development. In many EU Member States, such a strategy does not exist at the moment.

The aim of this Section was to highlight some of the conditions necessary for the implementation of a project based on the TCLM programme. This study does not contain an exhaustive analysis of all issues involved. Further research into national legal frameworks is needed in order to establish whether the above mentioned conditions for implementing this model are present in the other European Member States. It is clear however that a flexible legislation, combined with a migration policy linked to co-development, is a *condition sine qua non* for the TCLM programme. The important role which the EU can play for the implementation of international adaptive migration will be discussed more in detail in PART III of this study.

However, some limitations have to be taken into account when promoting the TCLM programme as a model for international adaptive migration. Firstly, circular migration is only relevant for regions of origin that have not become permanently uninhabitable. A programme such as the TCLM programme furthermore represents a context-based migration framework that should be adapted to the specific local context, both in the country of origin and of destination. Finally, the amount of direct

³⁶⁹ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 79.

³⁷⁰ J.J. Vergé Oms, 'Planned Migration', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 13.

³⁷¹ N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 34.

beneficiaries, *i.e.* participating migrant workers, seems to be limited. Therefore the focus must be on the development impact of the migration experience for the communities of origin.

2.2. Other illustrations of international adaptive migration

Although the concept of international adaptive migration is relatively new in academic research, important lessons can already be drawn from certain existing migration schemes addressing populations affected by environmental changes. As discussed above (*see Chapter I, Section 1.1.4.1.*), the populations of the “sinking island nation” Tuvalu and other threatened Pacific islands can get access to New Zealand through the Pacific Access Category (PAC) programme³⁷². Even though this migration scheme does not specifically target environmentally-affected people, Tuvaluans wanting to leave their country for environmental reasons can apply for a visa and work permit through New Zealand’s PAC programme, provided they fulfil the conditions for application³⁷³. This way, the programme offers certain members of the community an opportunity to migrate proactively, and support their households and communities to remain in Tuvalu as long as possible. However, in order for a labour migration programme such as the PAC programme to be considered as effective adaptive migration, it should be actively linked to adaptation needs in the country of origin.

In Niger, severe environmental disruptions, caused by droughts, soil degradation, sand intrusion and the shrinking of Lake Chad have an impact on migration at the national and international level (*see above in Chapter I, Section 1.1.4.3.*). Working age males who used to move seasonally within the country, now leave to further destinations in and outside the country, and migrate for longer periods, or even permanently. The women, children and elderly who stay behind, lack sufficient physical support to restore the environment. As mentioned above (*see Chapter I, Section 1.3.2.2.*), in 2006 the government therefore started a programme, offering financial support to encourage young men to return to their region of origin, and to take part in the ecological restoration of the

³⁷² Immigration New Zealand, Pacific Access Category Programme, available at: <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>.

³⁷³ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 115; Environmental Justice Foundation (EJF), *No Place like Home. Where next for climate refugees?*, A report by the Environmental Justice Foundation, London, 2009, available at: <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf>; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 325.

environment³⁷⁴. This project shows that return migration can not only benefit the socio-economic development of the region of origin, but also contribute to resilience-building of the home community, and even to the ecological restoration of the region of origin.

Aside from temporary or permanent labour migration and return migration, also relocation can serve as an effective adaptation strategy, provided it is well-planned and organised, and with respect for migrants' fundamental rights. In particular in the face of predictable environmental changes, such as sea level rise, or certain predictable natural hazards, such as volcanic eruptions, governments may choose to relocate large populations from the affected areas³⁷⁵. In Montserrat for example, the UK Government supported the relocation of about 12.000 inhabitants due to increased volcanic activity between 1995 and 1997³⁷⁶. While a population which can no longer survive in their region of origin usually abandons the region gradually, in some cases, an organised exodus of the region occurs. As relocation mostly happens within national borders, it seems not to be relevant in the context of a study on international adaptive migration. Nonetheless, when internal relocation is not or no longer an option, international relocation might be considered a necessity. Large-scale relocation is for example considered as one of the options for several threatened island nations, which are even said to consider the acquisition of new land in countries such as Fiji and Sri Lanka³⁷⁷. Likewise, in the case of Montserrat, a part of the relocated inhabitants were relocated to other Caribbean islands or even to the UK³⁷⁸. However, in the past, various cases of planned resettlement have illustrated that a whole range of social, political and economic problems is associated to government-led relocation of whole communities. In Montserrat for example, the local economy has never recovered from the temporary relocation of the island's population. Obviously, where the necessary standards are not met and migrants' fundamental rights are not respected, relocation cannot be considered as a positive adaptation strategy.

Although it is generally accepted that international migration can serve as an adaptation strategy, the migration policy and legal framework in many countries is not equipped to bring migrants' knowledge, skills and/or financial means into action for the socio-economic development and

³⁷⁴ T. Afifi, 'Economic or Environmental Migration? The Push Factors in Niger', 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e95-e124.

³⁷⁵ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 176.

³⁷⁶ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 177.

³⁷⁷ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 144-145; Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 177-178.

³⁷⁸ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 177.

adaptation of their region of origin. In order to support international adaptive migration, there is a need for more policy-oriented research, specifically targeted at how to maximise the benefits and reduce the costs of international adaptive migration³⁷⁹. Pilot projects of international migration schemes for communities affected by environmental changes can certainly help this research forward. In this context, organisations such as the IOM could play an important role. The IOM already has a long established involvement in the field of migration and environmental change. The Organisation pioneered with a number of important publications on the topic³⁸⁰, and its work includes both empirical and legal research, policy dialogue, capacity building, advocacy and operational activities. As for the latter, the IOM supports in particular migration as an adaptation strategy through its Development Fund, including some innovative pilot projects. In Mali, the IOM supports for example national and local institutions in managing environment-induced migration within the framework of their strategy for reducing vulnerability to climate change. In Egypt, a pilot project to assess and develop strategies to respond to the impacts of sea level rise on human mobility receives IOM funding, while in Senegal, the IOM supports the promotion of youth labour in the environmental sector, as a way to combat irregular migration³⁸¹.

3. LEGAL AND POLITICAL CHALLENGES FOR INTERNATIONAL ADAPTIVE MIGRATION

The adverse effects of climate change do not only constitute the forecast for tomorrow, they are already happening in many regions of the world. In order to respond to current impacts, while at the same time preparing for future effects, the international community should invest in the adaptive

³⁷⁹ D. Wrathall and B. Morris, 'Confronting Environmental Migration: A Framework for Research, Policy and Practice', Research Brief of the UNU-EHS Munich re Foundation Chair on Social Vulnerability, April 2009, available at: <http://www.ehs.unu.edu/file.php?id=590>, p. 4-5, 8.

³⁸⁰ See among others: International Organisation for Migration (IOM), 'Disaster risk reduction, climate change adaptation and environmental migration: A Policy Perspective', Geneva, 2010, available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/DRR-CCA-Policy-Paper-Final.pdf; F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration (IOM), Geneva, 2009, 448 p.; International Organisation for Migration (IOM), 'Migration, Development and Natural Disasters: Insights from the Indian Ocean Tsunami', IOM *Migration Research Series* N° 30, 2007, available at: <http://publications.iom.int/bookstore/pub/.euthosdczjtixxqy/MRS30.pdf>.

³⁸¹ United Nations Framework Convention on Climate Change (UNFCCC), Submission of the International Organisation for Migration (IOM) to the UNFCCC Concerning Draft Decisions 23 and 24 of 5/CP.17 of the National Adaptation Plans (NAPS), Information on Support to the National Adaptation Plan Process in the Least Developed Countries, Subsidiary Body for Implementation, Thirty-Sixth Session, Bonn, 14-25 May 2012, 12 April 2012, available at: <http://unfccc.int/resource/docs/2012/sbi/eng/misc02.pdf>, p. 15.

capacity of the most vulnerable countries, so as to increase their resilience to climate change impacts. This Chapter aimed to understand how international migration can contribute to the adaptive capacity of communities affected by environmental changes. The above described TCLM programme between Colombia and Spain is an innovative and inspirational migration model, as it turns environment-induced migrants into agents for development and adaptation, by providing temporary relief and livelihood alternatives, generating co-development and building resilience. It illustrates that circular labour migration can be beneficial for the migrants themselves, their countries of origin and of destination. The TCLM programme is relatively successful. Without this programme, most of the beneficiaries would not have had the possibility to work temporarily in Spain. It has offered them a facility to increase their income and gain knowledge and skills. Some of the criticisms on temporary and circular labour migration are adequately addressed. As the Programme is, in itself, not a solution for all affected persons, the challenge is to maximise its co-development outcome, and to turn it into a tool creating opportunities for development and adaptation.

International migration is increasingly recognised as a strategy to adapt to a changing environment. Policymakers should now be informed on how to accommodate international migration for disaster-affected or vulnerable communities. Through a case study of the TCLM programme between Colombia and Spain, this Chapter described some of the policy responses that can be taken to maximise the benefits of such movements for development and adaptation, and to minimise its costs. However, more policy-oriented research and pilot projects are needed to convince policymakers to regard migration “as part of the solution rather than the problem”³⁸². In order to bring about the necessary radical change in the migration policy of developed countries, we need to better understand the advantages of linking migration with development and adaptation. However, some policy recommendations can already be identified.

As already mentioned above in the study of the TCLM programme, international adaptive migration requires a solid legal framework, allowing environmentally-affected people to migrate legally, and actively supporting and facilitating the contribution of their migration to adaptation. Options for legal migration should thus be supplemented with possibilities to earn an income in the country of destination, send remittances to households and communities left behind, receive reintegration assistance in case of a return to the country of origin, *etcetera*. Furthermore, the necessary financial means should be available in order to finance these measures.

³⁸² C. Tacoli, ‘Crisis or adaptation? Migration and climate change in a context of high mobility’, 21 *Environment and Urbanization* 2, 2009, p. 512.

The following conditions can be identified as necessary conditions for the installation of international adaptive migration, and should be considered by international policymakers willing to bring the theory of migration as an adaptation strategy into practice:

- the provision of legal migration opportunities, *i.e.* the right to enter and stay in another country than the country of origin or habitual stay;
- respect for migrant rights in the destination country, including the right to work;
- a policy actively linking migration to development and adaptation; and
- funding to support these measures facilitating international adaptive migration.

As for the right to enter and stay in the country of destination, migration projects could be specifically oriented at environment-induced migrants, for example through *ad hoc* programmes for victims of natural disasters. Labour migration projects could target disaster-affected or vulnerable communities, for instance through the conclusion of bilateral or regional migration agreements with countries affected by environmental degradation. In this context, it is important for industrialised countries not only to allow high-skilled labour migration.

In order to facilitate migration as an adaptation strategy, it is crucial to strengthen the linkage between different policy areas. In my opinion, one of the most important merits of the TCLM programme is that it brings together migration policy with environmental and development policies. Governments could integrate environment-induced migration into their development policy, by enhancing migrants' contribution to the sustainable socio-economic development of their countries of origin. Migration could moreover be mainstreamed into national and international adaptation plans, as it can relieve pressure on destructed or degraded regions, and provide alternatives to the affected population. Finally, environmental motives could be included into a coherent migration policy. By creating programmes specifically addressing environmentally-affected communities, or by prioritising victims of environmental disruptions in our mainstream migration policy, it is possible to both manage migration when migration pressure rises, and offer relief to the affected persons.

In order to effectively link migration to development and adaptation, the benefits of international migration for adaptation and development should be maximised, for example through reduced costs for sending remittances, specific investments in skill-building of vulnerable communities, and by channelling financial and social remittances to job-creating initiatives and adaptation measures in countries of origin. By supporting migrants in maximising the impact of remittances on the recovery of their place of origin, their resilience to environmental disruptions could be remarkably increased.

On the other hand, the costs of international migration should be minimised, for instance by taking measures to prevent brain drain.

Finally, new and innovative funding mechanisms are needed to promote and support international migration as an adaptation strategy, and actively encourage the contribution of migrants to the adaptation and development of their home communities. As many of the funding mechanisms for adaptation to the adverse effects of climate change are now under discussion in the international climate negotiations, it is relevant to discuss the application of those mechanisms in the context of environment-induced migration (*see further below in Chapter IV, Section 2.4.2.*).

Among legal scholars, there has been some discussion concerning which legal framework is best suited to support migration as an adaptation strategy. PART II and III of this study will further assess how to adopt (preferable legally-binding) provisions on migration as an adaptation strategy, and which is the appropriate legal framework to adopt such measures. International adaptive migration represents a comprehensive and durable approach towards environment-induced human mobility. If the EU would adopt some of these recommendations in its migration law and policy, it might set a precedent for linking migration, development and adaptation in the rest of the world. Some policy proposals will therefore be further developed in PART III of this study.

Chapter III. When adaptation fails: legal protection in case of environment-induced displacement

The previous Chapter described how international migration might act as a positive adaptation strategy for households and communities affected by various types of environmental change. However, if adaptation to environmental degradation fails, whether it concerns *in situ* adaptation or through adaptive migration, people often have no other option left than to leave their environment in an unplanned and unorganised way. In order to survive, they are then *forced* to leave their environment, and become *displaced persons*.

An *environmentally-displaced person* has been defined in Chapter I as

any person who is forced to leave his (former) habitual residence, mainly because of a marked environmental disruption (natural and/or triggered by people) that jeopardises his existence and/or seriously affects the quality of his life, and is unable to avail himself of the protection of his home state due to the state's unwillingness or inability to protect him.

As for *international* environment-induced displacement, the question then rises under which circumstances environmentally-displaced persons are protected under international law, whether or not a country of flight can force them to return to their region of origin, and in which case they can get legal access to another country than their country of origin or former habitual residence. This Chapter aims to answer these questions by analysing human rights-based *non-refoulement* obligations, based on case law of the European Court of Human Rights and the European Court of Justice. Furthermore, it provides the reader with an overview of some codified complementary protection regimes which might become applicable in the context of environment-induced displacement. As asylum and migration law remain a matter of national sovereignty – in the EU partly handed over to the regional level –, the European context provides a good starting point for this examination. Through a study of both the general principle of *non-refoulement* and codified forms of complementary protection, it will be analysed whether or not environmentally-displaced persons are under the current state of law sufficiently protected when they are forced to leave their country of origin for environmental reasons.

1. HUMAN RIGHTS-BASED PROTECTION AGAINST A FORCED RETURN

The lack of explicit protection mechanisms for international environmentally-displaced persons has already been widely discussed by many authors³⁸³. At this moment, there is no international legal framework specifically addressing environmentally-displaced persons. However, a number of international, regional and national instruments might offer some form of protection to environmentally-displaced persons crossing international borders. In Chapter I of this study, the international refugee regime has been held to the light in the context of migration and environmental change. It has become clear that the 1951 Refugee Convention and its 1967 Protocol do currently not apply to environmentally-displaced persons, except for a very limited group such as the Marsh Arabs (see *Chapter I, Section 1.2.1.*), and neither is it advisable to adapt the Convention in that sense. Therefore, several authors have proposed a more human rights-based approach, discussing whether environmentally-displaced persons could be protected against a forced return or '*refoulement*' through general human rights law. After all, the *non-refoulement* principle is not only one of the greatest benefits of the 1951 Refugee Convention³⁸⁴, it is also a cornerstone of human

³⁸³ See for example J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/refworld/docid/4e09a3492.html>; A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 365-409; F. Biermann and I. Boas, 'Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees', Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf; F. Biermann and I. Boas, 'Global adaptation governance, the case of protecting climate refugees', in F. Biermann, P. Pattberg F. and Zelli (eds.), *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, 2010; V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', 11 *European Journal of Migration and Law*, 2009, p. 313-326; C. Cournil, 'Les réfugiés écologiques: Quelle(s) protection(s), quel(s) statut(s)?', *Revue du droit public* N° 4, 2006; N. de Moor and A. Cliquet, 'Seeking Refuge from the Environment: Legal Protection for Environmentally-Displaced Persons', 8 *AEMI Journal*, Association of European Migration Institutions, September 2010, p.58-73; C. Dewitte, 'At the water's edge: Legal protections and funding for a new generation of climate change refugees', 16 *Ocean and Coastal Law Journal* 1, 2011, p. 211-238; B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law' 18 *Villanova Env'tl. L.J.*, 2007; V. Kolmannskog, 'Cross-border displacement: International law and protection', in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf; V. Kolmannskog and L. Trebbi, 'Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps', 92 *International Review of the Red Cross* 879, September 2010, p. 713-730; M. Leighton, 'Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons', The German Marshall Fund of the United States, Study Team on Climate-Induced Migration, June 2010, available at: http://www.gmfus.org/galleries/default-file/Leighton_MAH_EditsV2.pdf.

³⁸⁴ Article 33 of the 1951 Refugee Convention: "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

rights law, where it acts as a general ban on returning persons to places where they risk certain human rights violations. The principle has found expression in, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR)³⁸⁵ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³⁸⁶.

Through a study of both the general principle of *non-refoulement* (1.1.) and its application in the specific context of deteriorating socio-economic living conditions (1.2.), this Section will analyse if and how human rights law can serve to protect environmentally-displaced persons against a forced return to their destructed region of origin.

1.1. In general: applying existing non-refoulement obligations to environmentally-displaced persons

Except for the 1951 Refugee Convention and the Convention against Torture³⁸⁷, international human rights instruments do not explicitly contain *non-refoulement* obligations, but instead contain *implied* obligations not to return a person to countries where certain primary human rights are violated³⁸⁸. The European Court of Human Rights has for example ruled that the prohibition on torture and inhuman or degrading treatment or punishment of Article 3 ECHR implies a duty not to return a person to a place where he risks being subjected to the prohibited treatment. According to the Court in the *Soering*-case,

“the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being

on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

³⁸⁵ International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, entered into force on 23 March 1976, 999 *UNTS* 171.

³⁸⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted in Rome on 4 November 1950, entered into force on 3 September 1953, 213 *UNTS* 222.

³⁸⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, entered into force on 26 June 1987, 1465 *UNTS* 85.

³⁸⁸ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 265.

subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”³⁸⁹

This view was confirmed in the case of *Cruz Varas v. Sweden*, where the Court ruled that the reasoning of the *Soering*-case also applies to the expulsion of rejected asylum seekers³⁹⁰. This was again reaffirmed in later judgements, where the Court found that

“expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned”³⁹¹.

In a more recent judgement of 2007 the Court summarised its position as follows:

“The right to political asylum is not contained in either the Convention or its Protocols. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct, however undesirable or dangerous. The expulsion of an alien may give rise to an issue under the provision, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country”³⁹².

Clearly, the *non-refoulement* principle is a fundamental component of the prohibition of torture, cruel, inhuman or degrading treatment or punishment. In this context, the principle is generally considered to be part of customary international law³⁹³.

The existence of such implicit *non-refoulement* obligations has been generally accepted in relation to the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

³⁸⁹ European Court of Human Rights, *Case of Soering v. The United Kingdom*, Application No. 14038/88, Judgement of 7 July 1989, § 91.

³⁹⁰ European Court of Human Rights, *Case of Cruz Varas v. Sweden*, Application No. 15576/89, Judgement of 20 March 1991, § 70.

³⁹¹ European Court of Human Rights, *Case of Vilvarajah and Others v. the United Kingdom*, Application No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgement 30 October 1991, § 103; See also in European Court of Human Rights, *Case of Chahal v. the United Kingdom*, Application No. 22414/93, Judgement of 15 November 1996, § 74.

³⁹² European Court of Human Rights, *Case of Salah Sheekh v. The Netherlands*, Application No. 1948/04, Judgement of 11 January 2007, § 135.

³⁹³ E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement’, *Opinion*, United Nations High Commissioner for Refugees (UNHCR), 20 June 2001, p. 141-149.

and the right to life³⁹⁴. For other human rights, there is disagreement about the existence of a *non-refoulement* component. Treaty bodies such as the UN Human Rights Committee have declared that the scope of the *non-refoulement* principle is not limited to the right to life and the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment³⁹⁵. Likewise, the European Court of Human Rights has in various cases left the possibility open for *non-refoulement* protection to be in the future extended to other human rights than Article 3 ECHR³⁹⁶. An interesting example of such an extension is to be found in the case of *Othman v. UK*, in which the Court ruled that the applicant's deportation to Jordan would constitute a violation of Article 6 ECHR as his retrial there would amount to a "flagrant denial of justice", due to, among others, the admission of evidence obtained by torture³⁹⁷. In theory, *non-refoulement* protection would thus be possible for all human rights violations, but in practice, *non-refoulement* protection is generally only established for absolute rights, such as the right not to be subjected to cruel, inhuman or degrading treatment³⁹⁸. As explained by the European Court of Human Rights in the case of *Z. and T. v. United Kingdom*, the fundamental importance of the rights involved, their absolute or non-derogable nature as well as the fact that the obligations are "internationally accepted", determines to what extent the *non-refoulement* doctrine could be extended to other human rights³⁹⁹.

It has been widely discussed whether or not people displaced due to severe environmental conditions in their country of origin can rely on *non-refoulement* protection in their country of destination. There is no doubt that, in certain cases of severe environmental disasters, people cannot (yet) rebuild their lives in their region of origin. The most infamous example are the "sinking" island

³⁹⁴ M. Foster, 'Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', *New Zealand Law Review*, 2009 PART II, p. 265-266.

³⁹⁵ United Nations Human Rights Committee (UNHRC), General Comments No. 31 on the 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', adopted on 29 March 2004 at its 2187th Meeting, CCPR/C/21/Rev.1/Add.13 (General Comments) of 26 May 2004, § 12.

³⁹⁶ See for example European Court of Human Rights, *Case of Soering v. The United Kingdom*, Application No. 14038/88, Judgement of 7 July 1989, § 85, 113; European Court of Human Rights, *Case of F. v. the United Kingdom*, Application No. 17341/03, Judgement of 22 June 2004 (with regard to Articles 5, 6 and 8 ECHR); European Court of Human Rights, *Case of Z. and T. v. United Kingdom*, Application No. 27034/05, Judgement of 28 February 2006 (with regard to, *inter alia*, Article 9 ECHR); European Court of Human Rights, *Case of Ould Barar v. Sweden*, Application No. 42367/98, Judgement of 19 January 1999 (with regard to Article 4 ECHR).

M. Foster, 'Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', *New Zealand Law Review*, 2009 PART II, p. 274.

³⁹⁷ European Court of Human Rights, *Case of Othman (Abu Qatada) v. UK*, Application No. 8139/09, Judgement of 17 January 2012, § 258-287.

³⁹⁸ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 53-55.

³⁹⁹ European Court of Human Rights, *Case of Z. and T. v. The United Kingdom*, Application No. 27034/05, Judgement of 28 February 2006, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=45ccab042>, p. 6; M. Foster, 'Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', *New Zealand Law Review*, 2009 PART II, p. 277-278.

states in the Pacific Ocean. However, also in case of sudden-onset natural disasters, a temporary ban on forced removals to the destructed region of origin would in many cases be advisable. However, whether or not states have a legal *non-refoulement* obligation in such cases, depends on the interpretation of the human rights-based *non-refoulement* principle, subjected for a large part to the assessment made by international and regional human rights courts.

Up till now, the European Court of Human Rights has not explicitly dealt with environment-induced displacement. Nonetheless, lessons can be learned from the Court's progressive interpretation of the notion of 'inhuman and degrading treatment' of Article 3 ECHR⁴⁰⁰. Various authors have argued that sending environmentally-displaced persons back to a region where they can no longer survive, amounts to an inhuman or degrading treatment. It is up to the Court to decide whether such a progressive development of the *non-refoulement* component of Article 3 ECHR is acceptable. For the case of environmentally-displaced persons, it is for example interesting to explore whether deteriorating socio-economic living conditions could trigger a right to *non-refoulement* protection, as they often suffer from famine, a lack of medical treatment or education, or other forms of socio-economic deprivation (*see further below in Section 1.2.*).

As for the right to life, there is, at this moment, no *non-refoulement* obligation attached to Article 2 ECHR. However, as state practice and jurisprudence could develop in this direction in the future, the question rises whether Article 2 ECHR could protect environmentally-displaced persons against a forced return to their destructed region of origin. After all, unlike Article 3 ECHR, Article 2 ECHR has been applied in relation to environmental disruptions, be it not in removal cases. According to the European Court of Human Rights, the right to life includes the obligation for states "to take appropriate steps to safeguard the lives of those within its jurisdiction", including protection from environmental harm, for example caused by an industrial accident at a waste-collection site⁴⁰¹. In 2008, the judgement of the Court in the *Budayeva*-case decided on a violation of the right to life on account of the state's failure to act adequately in preventing a mudslide⁴⁰². The right to life thus deserves further attention in the future as a possible way to grant *non-refoulement* protection to environmentally-displaced persons.

⁴⁰⁰ V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', 11 *European Journal of Migration and Law*, 2009, p. 321-324.

⁴⁰¹ European Court of Human Rights, *Case of Öneriyildiz v. Turkey*, Application No. 48939/99, Judgement of 30 November 2004, § 71; J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 59.

⁴⁰² European Court of Human Rights, *Case of Budayeva and Others v. Russia*, Application No. 15339/02, 21166/06, 20058/02, 11673/02 and 15343/02, Judgement of 20 March 2008; V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', 11 *European Journal of Migration and Law*, 2009, p. 320.

Finally, it should be noted that the jurisprudence of the European Court of Human Rights increasingly puts the concept of an ‘internal flight alternative’ forward. It thus limits *non-refoulement* protection to those displaced persons which cannot find a safe refuge elsewhere in their country of origin. In examining the existence of an internal flight alternative, the Court employs criteria which now largely correspond to Article 8 of the 2011 Qualification Directive (*see further below in Section 2.2.1.3.*), such as the question whether there is a real risk of harm in the alternative region, whether the applicant can travel to and gain admittance to that region, and whether the general circumstances prevailing in that part of the country allow a living in relative safety⁴⁰³. In applying the principle of *non-refoulement* to the context of environment-induced displacement, it should thus be kept in mind that *non-refoulement* protection would only be available to those displaced persons who cannot relocate to another region in their country of origin which is not severely affected by environmental degradation or a sudden-onset natural disaster.

1.2. Relevance of socio-economic living conditions in the country of origin

In considering whether the *non-refoulement* doctrine also applies to a deprivation of socio-economic rights, our attention is obviously first turned to international instruments protecting socio-economic rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁰⁴. However, as it is currently not generally accepted to attach *non-refoulement* obligations directly to socio-economic rights, the ICESCR is not (yet) relevant for the present purpose⁴⁰⁵. Since violations of socio-economic human rights in the country of origin do not lead to a direct *non-refoulement* protection, it has often been attempted to re-characterise them as violations of civil and political human rights⁴⁰⁶.

⁴⁰³ European Court of Human Rights, *Case of A.A.M. v. Sweden*, Application No. 68519/10, Judgement of 3 April 2014, § 67-74; European Court of Human Rights, *Case of Sufi and Elmi v. the UK*, Application Nos. 8319/07 and 11449/07, Judgement of 28 June 2011, § 265-267; European Court of Human Rights, *Case of Salah Seekh v. the Netherlands*, Application No. 1948/04, Judgement of 11 January 2007, § 141.

⁴⁰⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI), entered into force on 3 January 1967, 993 UNTS 3.

⁴⁰⁵ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 278-284.

⁴⁰⁶ J. McAdam, *Climate Change, Forced Migration and International Law*, Oxford University Press, Oxford, 2012, p. 53-55; J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement

The idea that civil and political rights can be interpreted as incorporating obligations of a socio-economic nature is increasingly gaining attention, and has been recognised by various treaty bodies and regional human rights courts, such as the European Court of Human Rights. Both the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment have been recognised as rights extending to socio-economic deprivation under certain circumstances. Homelessness might for example engage the right to privacy or the right to life⁴⁰⁷, while poor detention conditions have been characterised as inhuman or degrading treatment⁴⁰⁸ (*see further below*). The question then rises whether this interpretation also applies to the removal context. After all, even though treaty bodies as well as human rights courts have attempted to define the scope of implied *non-refoulement* obligations, there still remains a lot of uncertainty as to its exact limitations.

1.2.1. Socio-economic living conditions and the notion of inhuman and degrading treatment

In assessing whether sending a person back to a degraded or destructed environment is prohibited, the scope of the notion of ‘inhuman or degrading treatment’ has been widely discussed. According to the European Court of Human Rights, Article 3 ECHR can be applied in new contexts which might arise in the future, irrespective of the responsibility of the public authorities⁴⁰⁹. According to Antonio Cassese, Article 3 ECHR, which is grounded in the concept of human dignity, must be interpreted broadly, not limited to physical or psychological mistreatment in the civil rights area, and is therefore suitable to protect economic and social rights, be it only in extreme cases⁴¹⁰. However, it is up to the Court to decide how progressively it wants to develop Article 3 ECHR.

The Court has first started to develop a broader interpretation of ‘inhuman and degrading treatment’ outside of the *refoulement* context. Already in 1990, the European Commission of Human Rights (which later became obsolete with the restructuring of the European Court of Human Rights) was

convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 25.

⁴⁰⁷ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 266.

⁴⁰⁸ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011.

⁴⁰⁹ European Court of Human Rights, *Case of D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997.

⁴¹⁰ A. Cassese, ‘Can the Notion of Inhuman and Degrading Treatment be applied to Socio-Economic Conditions?’, 2 *European Journal of International Law* 1, 1991, p. 143.

asked to rule on whether the notion of ‘inhuman or degrading treatment’ could be applied to socio-economic conditions⁴¹¹. Francine Van Volsem, a Belgian single mother with 2 children, was unable to hold a stable job due to severe health issues. She relied for her living on the alimony paid by her ex-husband, as well as on social security provided by a Belgian social welfare centre. As the heating in her small apartment ran on electricity, she was unable to pay the disproportionately high electricity bill. In December 1983, the electricity company therefore cut off her electricity. In her application to the European Commission of Human Rights, Mrs. Van Volsem argued *i.a.* that the cutting of her electricity in a cold winter period amounted to inhuman and degrading treatment as prohibited by Article 3 ECHR. Although the case was held inadmissible, the Commission, ruling by a Committee of three, did not rule out the possibility to apply Article 3 to situations where social and economic conditions are so humiliating so as to amount to inhuman treatment⁴¹².

The question then rises whether this reasoning could also apply to a situation of environmental degradation or disruption. However, the decision in the case of Francine Van Volsem concerns socio-economic *treatment* by a state actor, instead of socio-economic conditions prevailing in a certain country. It seems therefore difficult to extend the Committee’s reasoning to environmental conditions. Furthermore, the Committee did not clarify under which circumstances a person’s daily living conditions, more in particular the lack of public social services, turn into inhuman or degrading treatment⁴¹³. It also remains unclear whether the Committee took the specific circumstances of the case, such as Mrs. Van Volsem’s health conditions and the fact that electricity was cut off in the coldest period of the winter, into account. It is therefore regrettable that the Committee of three did not refer this case to the plenary Commission, to provide greater clarity on these issues.

Later, the question whether a violation of social and economic rights could amount to inhuman or degrading treatment also came up in *non-refoulement* cases. However, most cases concerned a lack of medical treatment in the country of origin. In the case of *D. v. United Kingdom* of 1997, the Court found that returning a HIV-infected person would amount to ‘inhuman treatment’, due to a lack of sufficient medical treatment, social network, a home or any prospect of income in the country of origin⁴¹⁴. The Court came to this conclusion as the forced return would hasten the death of the

⁴¹¹ European Commission of Human Rights, *Case of Francine Van Volsem v. Belgium*, Application No. 14641/89, Decision of 9 May 1990, 2 *Revue Universelle Des Droits de L’Homme*, 1990, p. 348-385.

⁴¹² A. Cassese, ‘Can the Notion of Inhuman and Degrading Treatment be applied to Socio-Economic Conditions?’, 2 *European Journal of International Law* 1, 1991, p. 141-143.

⁴¹³ A. Cassese, ‘Can the Notion of Inhuman and Degrading Treatment be applied to Socio-Economic Conditions?’, 2 *European Journal of International Law* 1, 1991, p. 143.

⁴¹⁴ European Court of Human Rights, *Case of D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 321-322.

individual concerned, and “subject him to acute mental and physical suffering”⁴¹⁵. In light of these exceptional circumstances, and “bearing in mind the critical stage now reached in the applicant’s fatal illness”⁴¹⁶, the Court found that the return would amount to a violation of Article 3 ECHR by the United Kingdom. This ruling is remarkable, as the source of the ill-treatment in this particular case lied not only with the public authorities of the country of origin⁴¹⁷. Besides a lack of medical treatment, the Court also referred to the general situation of poverty in the country of origin, thus confirming that the notion of ‘inhuman or degrading treatment’, in the removal context, extends to deprivations of socio-economic rights other than a lack of medical treatment⁴¹⁸.

Severe environmental disruptions, caused by natural disasters or climate change, could lead to similar circumstances, when vital infrastructure is destroyed and the provision of basic services such as clean water, food and electricity is hindered⁴¹⁹. Nonetheless, it remains to be seen whether the European Court of Human Rights would apply the *non-refoulement* principle contained in Article 3 ECHR in such situations. After all, the Court emphasised in subsequent cases that its ruling in *D. v. United Kingdom* is only valid in “extreme circumstances”⁴²⁰. In *N. v. United Kingdom* for example, the Court distinguished the circumstances of the case from the “very exceptional case” of *D. v. United Kingdom*, “where the humanitarian grounds against the removal [were] compelling”⁴²¹, and found the case inadmissible, as the applicant was “not at present time critically ill”⁴²². By emphasising the exceptional character of the *D. v. United Kingdom* ruling, the Court has thus “limited any potential for an expansive approach to medical care cases in the future”⁴²³. It is clear that the ill-treatment needs

⁴¹⁵ European Court of Human Rights, *Case of D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997, § 52.

⁴¹⁶ European Court of Human Rights, *Case of D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997, § 53.

⁴¹⁷ European Court of Human Rights, *Case of D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997, § 49.

⁴¹⁸ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 290-291.

⁴¹⁹ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 321.

⁴²⁰ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 292.

⁴²¹ European Court of Human Rights, *Case of N. v. The United Kingdom*, Application No. 26565/05, Judgement of 27 May 2008, § 42.

⁴²² European Court of Human Rights, *Case of N. v. The United Kingdom*, Application No. 26565/05, Judgement of 27 May 2008, § 42 and 50.

⁴²³ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 293; J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/refworld/docid/4e09a3492.html>, p. 26.

to attain “a minimum level of severity”, depending *i.a.* on the duration of the treatment and the sex, age and health of the person concerned, so as to fall within the scope of Article 3 ECHR⁴²⁴.

However, while the European Court of Human Rights did not apply its *D. v. United Kingdom*-founding in removal cases relating to violations of socio-economic rights other than medical cases, Article 3 ECHR has been applied to other socio-economic contexts in “domestic cases”⁴²⁵. Based on a considerable body of international, regional and national jurisprudence, Michelle Foster argues that the Court’s analysis in these cases can also be applied to *refoulement* cases outside the medical context, and is not restricted to cases where the socio-economic deprivation is caused by intentional action of state actors⁴²⁶.

Support for this viewpoint can also be found in the recent landmark ruling of the European Court of Human Rights in the case *M.S.S. v. Belgium and Greece* of January 2011⁴²⁷. The case concerned an Afghan asylum seeker who, having transited through Greece, sought asylum in Belgium. After he was transferred back to Greece in application of the European Dublin Regulation, he was placed in a detention centre in a reduced space, with little access to food and sanitary facilities, in poor hygienic conditions, without ventilation and a proper place to sleep⁴²⁸. After he was released from the centre, M.S.S., having no means of subsistence, lived in a park in Athens in complete destitution⁴²⁹. These degrading detention and living conditions led the Court to condemn Greece for a violation of Article 3 ECHR, attaching substantial weight to the specific situation of M.S.S. as an asylum seeker⁴³⁰. According to the Court, asylum seekers should be regarded as “particularly vulnerable”, due to the traumatic experiences they might have endured⁴³¹. In light of this particular vulnerability, the socio-

⁴²⁴ European Court of Human Rights, *Case of N. v. The United Kingdom*, Application No. 26565/05, Judgement of 27 May 2008, §29; M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 289.

⁴²⁵ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 302.

⁴²⁶ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 302-305.

⁴²⁷ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011.

⁴²⁸ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, §§ 34 and 161-166.

⁴²⁹ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, §§ 35-37 and 167-172. V. Moreno-Lax, ‘Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*’, 14 *European Journal of Migration and Law*, 2012, p. 20-22.

⁴³⁰ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, §§ 225, 231-233, 259, 262-263; V. Moreno-Lax, ‘Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*’, 14 *European Journal of Migration and Law*, 2012, p. 22.

⁴³¹ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, § 232.

economic deprivation *in casu* attained the level of severity required to fall within the scope of Article 3 ECHR.

Applying the *non-refoulement* principle to this decision, Belgium was also condemned, not only for the possible ‘indirect’ *refoulement* of the applicant to Afghanistan through Greece, but also for the ‘direct’ *refoulement* to Greece⁴³². Based on the available information, Belgium should have decided that the applicant faced a real and individual risk in Greece to be treated in violation of Article 3 ECHR⁴³³. This decision is important, as it confirms that inhuman and degrading living conditions must be considered when applying Article 3 ECHR in expulsion cases, taking the particular vulnerable situation of the applicant into account.

It remains to be seen whether the European Court of Human Rights will take this line of reasoning further, and apply it when severe environmental disruptions lie at the basis of inhuman and degrading (socio-economic) living conditions. Much depends on Court’s interpretation of “exceptional circumstances” as in *D. v. United Kingdom*, and the “particular vulnerable situation” of the persons concerned as in *M.S.S. v. Belgium and Greece*. It is however questionable whether the Court will consider general situations of poverty or a lack of resources for a whole affected community. So while it is, in theory, possible to re-characterise environmental harm as inhuman or degrading treatment, this idea needs to be much further developed by international bodies and regional human rights courts, before it will ever be applied in practice by states⁴³⁴.

1.2.2. Socio-economic living conditions and the right to life

As mentioned above, the European Court of Human Rights has, up till now, only attached a *non-refoulement* obligation to the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 3 ECHR), and not (yet) to the right to life (Article 2 ECHR). However, the Court clearly left this possibility open for the future. Furthermore, it has been recognised in other fora that the right to life, as for example contained in Article 6 of the ICCPR, contains the right of every person not to be sent back to regions where he or she faces a real risk of being subjected to a

⁴³² V. Moreno-Lax, ‘Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*’, 14 *European Journal of Migration and Law*, 2012, p. 26.

⁴³³ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, §§ 347-354.

⁴³⁴ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 53-55.

violation of the right to life⁴³⁵. In examining whether or not a violation of socio-economic rights could lead to *non-refoulement* protection, the right to life thus offers another pathway. After all, the right to life is closely connected to other, socio-economic, human rights, such as the right to an adequate standard of living (including the right to food, housing,...), and the right not to be deprived of a means of subsistence. The European Court of Human Rights has for example declared that “an issue may arise under Art 2 [...] where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally”⁴³⁶. It will have to be seen whether the application of Article 2 ECHR in situations of deteriorating socio-economic living conditions will be further developed in the future, and be applied in removal cases.

2. A RIGHT TO STAY FOR ENVIRONMENTAL REASONS?

In light of the search for legal solutions to fill the normative gap for environmentally-displaced persons, the human rights-based concept of *non-refoulement* protection provides an interesting starting point. However, it is important to keep in mind that a *non-refoulement* prohibition does not oblige states to grant a legal residence status to protected persons (*see further below in Section 2.4.1.*)⁴³⁷. Therefore, it is interesting to examine whether environmentally-displaced persons could also be eligible to be granted a legal residence status on the basis of legislative refugee-like protection regimes for displaced persons. Moreover, by explicitly granting protection to environmentally-displaced persons, states can go further than the currently accepted interpretation of the human rights-based principle of *non-refoulement*.

⁴³⁵ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 56.

⁴³⁶ European Court of Human Rights, *Case of Cyprus v. Turkey*, Application No. 25781/94, Judgement of 10 May 2001, § 219.

⁴³⁷ J. McAdam, ‘The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection’, in J. McAdam (ed.), *Forced Migration, Human Rights and Security*, Hart Publishing, Oxford, 2008, 302p., p. 266-270; N. Mole, *Asylum and the European Convention on Human Rights*, 4th ed., Council of Europe Publishing, Strasbourg, 2007, p. 106; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 323.

2.1. United States: Temporary Protection Status

Even though the migration legislation of non-European countries is outside the scope of this study, an interesting example of legislative protection for victims of natural disasters can be found in the United States (USA). The US Immigration Act of 1990 provides for the granting of a Temporary Protection Status (TPS) in situations of an ongoing armed conflict, or in case “there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected”⁴³⁸. This protection is not granted automatically, but on a discretionary basis. The Secretary of Homeland Security, in consultation with the Secretary of State, must ‘designate’ a country before its citizens are eligible. In case of an environmental disaster, he can only do so when the foreign state has officially requested designation, and “is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state”⁴³⁹. The status is thus granted on the basis of objective information on the country of origin, rather than on individual circumstances of the applicants⁴⁴⁰. During their stay, TPS beneficiaries are allowed to work, but cannot apply for family reunification⁴⁴¹. The TPS can be issued for a period between six and 18 months, and can be extended if conditions do not change in the designated country⁴⁴². However, as the TPS is a *temporary* protection regime, its beneficiaries are not eligible to become permanent residents in the USA without a special act of Congress⁴⁴³.

While there have been many calls in the aftermath of natural disasters in the past to apply the TPS regime, the status has only been granted in a couple of cases. In 1998, following Hurricane Mitch, the TPS was issued to people from Honduras and Nicaragua, while people from El Salvador and Guatemala were only granted a temporary suspension of their return⁴⁴⁴. About 90.000 Hondurans

⁴³⁸ Immigration and Nationality Act Section 244, 8 U.S.C 1254, (b)(1)(B)(i).

⁴³⁹ Immigration and Nationality Act Section 244, 8 U.S.C 1254, (b)(1)(B)(ii) and (iii).

⁴⁴⁰ J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 37.

⁴⁴¹ Immigration and Nationality Act Section 244, 8 U.S.C 1254, (a)(1)(B) and (2).

⁴⁴² Immigration and Nationality Act Section 244, 8 U.S.C 1254, (b)(2) and (3).

⁴⁴³ Immigration and Nationality Act Section 244, 8 U.S.C 1254, (h)(1)(a); J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 37.

⁴⁴⁴ J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to

and 60.000 Nicaraguans were issued a TPS residence permit⁴⁴⁵. In 2001, the status was granted to people from El Salvador, where two earthquakes had caused serious damage⁴⁴⁶.

After the devastating earthquake that hit Haiti in 2010, the US government announced that it would apply the TPS regulation to Haitians staying on their territory unlawfully or with another visa. The beneficiaries were issued a residence as well as a work permit. This way, an estimated 125.000 Haitians who were irregularly residing in the USA could now work legally, and perhaps even financially support their community of origin to rebuild the country. The TPS regime was originally issued to Haitians for a period of 18 months, but has already been prolonged two times with another 18 months, until the end of July 2014. After all, the Haitians will need many years to rebuild their devastated country. The fact that this 'temporary' protection status is in practice often turned into a long-term migration regime is used by opponents of the TPS system as an argument against the application of this regime in the first place.

It is important to underline that the TPS permit is only granted to persons who already reside in the USA at the time of the disaster, often irregularly. So in the case of the earthquake in Haiti, it was only issued to those Haitians who were already in the USA on the 12th of January 2010, the day the earthquake hit Port-au-Prince. The US Immigration Act does not offer protection to victims of natural disasters who flee their country in the aftermath of a natural disaster, as the legislator did not want for this regime to attract newly displaced persons.

Even though the American TPS system offers a valuable example of legislative asylum-like protection in case of environmental disasters, the regime can be criticised for a couple of reasons. Firstly, the TPS system has been criticised for its limitation to persons already residing in the USA at the time of the disaster⁴⁴⁷. However, the US government adheres to the principle of *non-refoulement*, which

25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 38.

⁴⁴⁵ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19-20.

⁴⁴⁶ J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 38.

⁴⁴⁷ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19-20; J. McAdam,

applies to all persons equally, whether they are already residing in the country, or arriving after a disaster has occurred. What matters, is whether or not a forced return to the country of origin violates certain human rights. Therefore, it would be better to grant TPS to persons which cannot return to their country of origin in case an environmental disaster has substantially disrupted the living conditions, as well as to those persons fleeing the country because of that disaster. Furthermore, as mentioned above, the TPS is in practice often prolonged for many years, as it turns out to be difficult to return persons in the short-term to countries which have been severely damaged by a natural disaster. As a result, systematic extensions frequently turn this temporary regime into long-term settlements⁴⁴⁸. Nonetheless, the system does not allow its beneficiaries to become permanent residents, which leaves them in an unsecure legal situation for many years. Finally, TPS has only been granted in very exceptional circumstances. Even though nothing in principle would prevent the status from being granted to persons fleeing a slow-onset environmental disaster, it is highly unlikely that an affected country would be designated in such a case. Moreover, the most vulnerable persons will not be able to reach the territory of the USA⁴⁴⁹. The regime is thus only relevant to a very limited amount of persons which cannot return to their country of origin due to a sudden-onset environmental disaster. Regardless of these remarks, the American TPS regime has certainly some interesting elements for a more comprehensive protection regime for victims of environmental disasters. It is therefore relevant to compare it to European complementary protection regimes, which will be discussed further below.

'Climate Change Displacement and International Law: Complementary Protection Standards', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 38.

⁴⁴⁸ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19-20.

⁴⁴⁹ J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 38.

2.2. Codified complementary protection in the European Union

The 1951 Refugee Convention and its 1967 Protocol have been ratified and transposed by all Member States of the EU. However, many individuals which nowadays seek protection in Europe have needs which the 1951 Refugee Convention does not address⁴⁵⁰. In the past, states have often given complementary protection to forcibly displaced persons who do not fit within the 1951 refugee definition, but nonetheless deserve international protection. While such protection was often seen as a matter of charity and was granted on discretionary grounds, the past few years more and more legal frameworks have institutionalised such complementary protection, both at the regional and the national level. The nature of the protection granted as well as the eligibility criteria for such complementary forms of protection vary from one jurisdiction to another⁴⁵¹. They allow states for instance to grant a legal status to displaced persons which cannot be expelled on human rights grounds. Although such regimes often offer a lower form of protection than the international refugee regime, they are of great importance, as they could form the basis for the broadening of international protection mechanisms⁴⁵². Within the legal framework of the EU, two important regimes of complementary protection have been elaborated at the regional level in order to protect certain categories of displaced persons, namely the Council Directive 2001/55/EC of 20 July 2001 (Temporary Protection Directive)⁴⁵³ and the Council Directive 2004/83 of 29 April 2004 (Qualification Directive)⁴⁵⁴. This Section examines whether these regimes are applicable to environmentally-displaced persons, and if not, whether the European legislation could and should be adapted in that sense.

⁴⁵⁰ N. Mole, *Asylum and the European Convention on Human Rights*, 4th ed., Council of Europe Publishing, Strasbourg, 2007, p. 106.

⁴⁵¹ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 18.

⁴⁵² A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 392-393.

⁴⁵³ European Council, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *Official Journal* L 212 of 7 August 2001, p. 12-23 (hereafter: Temporary Protection Directive).

⁴⁵⁴ European Council, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal* L 304 of 30 September 2004, p. 12-23 (hereafter: Qualification Directive).

2.2.1. The Qualification Directive

If the EU wants to develop a comprehensive Common European Asylum System, it is necessary that complementary protection regimes are applied and interpreted in the same way across the Union. With this aim, the Qualification Directive⁴⁵⁵ was adopted in 2004 after a lengthy negotiation process⁴⁵⁶. The Directive covers two separate but ‘complementary’ regimes of international protection, namely the refugee status and the status of subsidiary protection. By defining who is a refugee and who is otherwise in need of international protection, the Directive aimed at ensuring a minimum standard of protection in all Member States and preventing asylum shopping in the Union⁴⁵⁷.

2.2.1.1. Applicability to environmentally-displaced persons

The Qualification Directive defines a refugee in consistence with the 1951 Refugee Convention. Furthermore, it attributes a legal complementary protection status to certain displaced persons within its territory which do not fit within the 1951 Refugee Convention, but are nonetheless in need of international protection. The Directive confirms the commitment of the EU Member States to the principle of *non-refoulement* “in accordance with their international obligations”⁴⁵⁸. While such protection used to be considered as a matter of charity, the Directive now grants subsidiary protection to persons not qualifying for refugee status if

⁴⁵⁵ European Council, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal* L 304 of 30 September 2004, p. 12–23 (*hereafter*: Qualification Directive). In 2011, the recast Qualification Directive was adopted: European Parliament and the Council, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *Official Journal* L 337/9 of 20 December 2011 (*hereafter*: 2011 Qualification Directive).

⁴⁵⁶ For an overview of the negotiation process, see: S. Peers and N. Rogers (eds.), *EU Immigration and asylum Law. Text and Commentary*, Martinus Nijhoff Publishers. Leiden, 2006, p. 326-327; J. McAdam, ‘The European Qualification Directive: The Creation of a Subsidiary Protection Regime’, 17 *Int’l J. Refugee L.* 461, 2005, p. 462-466.

⁴⁵⁷ Preamble (4) and (6) of the Qualification Directive.

⁴⁵⁸ Article 21 (1) of the Qualification Directive.

“substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin [...] would face a real risk of suffering from serious harm as defined in Article 15 [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”⁴⁵⁹.

In recent years, many authors have discussed whether subsidiary protection could be granted to environmentally-displaced persons⁴⁶⁰. It seems from the purpose of the Qualification Directive, namely providing international protection to those who need it, that environment-induced displacement could trigger subsidiary protection. However, as the Directive exhaustively enumerates the types of “serious harm” which can trigger a protection status, the following analysis will turn out disappointing for the fate of environmentally-displaced persons⁴⁶¹.

Unlike the Temporary Protection Directive (*see further below in Section 2.2.2.*), the Qualification Directive has exhaustively enumerated the situations which give right to a protection status. According to Article 15 of the Directive, “serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.

Environmental disruptions are not included in the list provided for in Article 15, which reflects a political compromise based on “the least contestable human rights-based protections which already form part of most Member States’ protection policies”⁴⁶². At the time the Qualification Directive was discussed, the international community seemed to be already aware of the problem of environment-induced displacement⁴⁶³. The Council even asked Member States whether the new instrument

⁴⁵⁹ Article 2(e) of the Qualification Directive.

⁴⁶⁰ See for example A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009; J. McAdam, ‘The European Qualification Directive: The Creation of a Subsidiary Protection Regime’, 17 *Int’l J. Refugee L.* 461, 2005; J. McAdam, *Climate Change, Forced Migration and International Law*, Oxford University Press, Oxford, 2012.

⁴⁶¹ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 397-398.

⁴⁶² J. McAdam, ‘The European Qualification Directive: The Creation of a Subsidiary Protection Regime’, 17 *Int’l J. Refugee L.* 461, 2005, p. 474.

⁴⁶³ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 398; J. McAdam, ‘The European Qualification Directive: The Creation of a Subsidiary Protection Regime’, 17 *Int’l J. Refugee L.* 461, 2005, p. 464.

should cover ‘environmental disasters’⁴⁶⁴. According to the European Parliament, environmentally-displaced persons “equally need[ed] protection”⁴⁶⁵. Nonetheless, as Member States did not support the inclusion of environmental disasters in Article 15, environmentally-displaced persons were ignored in the Qualification Directive⁴⁶⁶.

During the drafting process, the types of ‘serious harm’ triggering subsidiary protection were heavily discussed. Some of the proposals granted subsidiary protection to persons displaced due to human rights violations⁴⁶⁷. In such a “human rights paragraph”, serious harm would exist if a “violation of a human right, sufficiently severe to engage the Member State’s international obligations”⁴⁶⁸. This would allow a broad interpretation of the Qualification Directive, granting subsidiary protection on the basis of human rights violations, and taking into account developments in the case law of the European Court of Human Rights⁴⁶⁹. As victims of environmental disasters often face violations of their human rights, such a human rights provision could have been interpreted so as to include environment-induced displacement⁴⁷⁰.

However, none of the proposed human rights-provisions were retained in the final Directive. Instead, it was decided to limit the scope of the Directive to existing practices of complementary protection in

⁴⁶⁴ Council of the European Union, ‘Discussion Paper on subsidiary protection’, 13167/99, 19 November 1999, Asile 41; V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 319.

⁴⁶⁵ European Parliament, Report of 8 October 2002 on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001)510 – C5-0573/2001 – 2001/0207(CNS), Committee on Citizen’s Freedoms and Rights, Justice and Home Affairs, Rapporteur: Jean Lambert.

⁴⁶⁶ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 319-321.

⁴⁶⁷ European Commission, ‘Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection’, COM/2001/0510 final – CNS 2001/0207, 2001, Brussels, 12 September 2001; A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 398; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 319-321.

⁴⁶⁸ Article 15, European Commission, ‘Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection’, COM/2001/0510 final – CNS 2001/0207, 2001, Brussels, 12 September 2001; J. McAdam, ‘Complementary Protection and Beyond: How States Deal with Human Rights Protection’, New Issues in Refugee Research, UNHCR Working Paper No. 118, August 2005, available at: <http://www.unhcr.org/42fb1f045.pdf>, p. 3.

⁴⁶⁹ J. McAdam, ‘Complementary Protection and Beyond: How States Deal with Human Rights Protection’, New Issues in Refugee Research, UNHCR Working Paper No. 118, August 2005, available at: <http://www.unhcr.org/42fb1f045.pdf>, p. 3.

⁴⁷⁰ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 319-321.

the Member States, thus limiting the definition of “serious harm” to the three types enumerated in Article 15. Clearly, this exhaustive list left “little room for interpretation”⁴⁷¹. Only those persons facing a real risk of serious harm as explicitly defined in Article 15 are eligible for subsidiary protection. It seems thus hard to defend a wider interpretation of this provision. Nevertheless, some authors still argue that the Qualification Directive, as it currently stands, has left some opening for an interpretation including certain categories of environmentally-displaced persons as beneficiaries of subsidiary protection.

2.2.1.2. Extended interpretation of the Qualification Directive?

Various authors have argued that Article 15(b), granting subsidiary protection in case of ‘inhuman or degrading treatment or punishment’, could open some room for a larger interpretation⁴⁷². Based on the above described case law of the European Court of Human Rights, some have proposed to interpret the notion of “inhuman or degrading treatment” so as to include the forced return of environmentally-displaced persons to regions which can no longer sustain human life⁴⁷³.

However, the European Court of Justice (ECJ) has also discussed whether severe socio-economic living conditions should be taken into account in the assessment of claims for a protection status under the Qualification Directive. In the case *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* of March 2010⁴⁷⁴, the ECJ was asked in a preliminary ruling whether the cessation of refugee status under Article 11(e) also requires that the general living conditions in the country of origin ensure a minimum standard of living. While the Court left this question unanswered, the Advocate General Mazak held that the availability of a minimum standard of living in the country of origin is not “an independent relevant criterion when assessing cessation”, but that they “must

⁴⁷¹ J. McAdam, ‘Complementary Protection and Beyond: How States Deal with Human Rights Protection’, New Issues in Refugee Research, UNHCR Working Paper No. 118, August 2005, available at: <http://www.unhcr.org/42fb1f045.pdf>, p. 3.

⁴⁷² See for example J. McAdam, ‘Complementary Protection and Beyond: How States Deal with Human Rights Protection’, New Issues in Refugee Research, UNHCR Working Paper No. 118, August 2005, available at: <http://www.unhcr.org/42fb1f045.pdf>, p. 3; A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 396-399; ⁴⁷² V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 321-322.

⁴⁷³ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 321-322.

⁴⁷⁴ European Court of Justice, *Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgement of the Grand Chamber of 2 March 2010.

however be taken into consideration as part of the assessment of whether the change in circumstances there can be considered significant and non-temporary in nature in accordance with Article 11(2)”⁴⁷⁵.

Although the Court remained silent on this issue, the Advocate General thus seems to suggest that socio-economic living conditions may be considered when ruling on the effectiveness of the available protection. Nonetheless, the ECJ seems, at this moment, not to support the idea that deteriorating socio-economic living conditions can be part of a wide interpretation of the notion of ‘inhuman or degrading treatment’, thereby granting access to subsidiary protection to persons fleeing a situation of socio-economic destitution.

However, whether or not such a broad interpretation of this eligibility criterion will be accepted in the future, not only depends on the case law of the ECJ, but also on the jurisprudence of the European Court of Human Rights (ECtHR), as Article 15 (b) is based on Article 3 ECHR. It is generally accepted that human rights provisions could help to clarify the scope of Article 15 of the Qualification Directive. In a judgement of 17 February 2009, the ECJ has explicitly referred to Article 3 ECHR for the interpretation of ‘inhuman or degrading treatment’ in Article 15(b) of the Qualification Directive⁴⁷⁶. Based on the above described evolution within the case law of the ECtHR on Article 3 ECHR, it could thus be argued that the Qualification Directive might provide the necessary protection to environmentally-displaced persons in the distant future. In particular the ruling of the ECtHR in the case *M.S.S. v. Belgium and Greece*, which came later than the ECJ ruling in *Salahadin Abdulla*, might act as a catalyst in European case law on asylum. If the ECJ wants to keep its jurisprudence in line with that of the ECtHR, it will have to adapt its line of reasoning in *Salahadin Abdulla*, and accept that inhuman and degrading living conditions may trigger a right to subsidiary protection.

For the case of environmentally-displaced persons, it is however important to keep the limits of what can be achieved within the existing legal framework of the EU in mind. At this moment, neither Article 2 nor Article 3 ECHR have been applied by the ECtHR in removal cases concerning environment-induced migration, and it is clear that the ECJ will not take this step before the ECtHR does. A wide interpretation of the Qualification Directive so as to include environmentally-displaced persons was clearly not the intention of the drafters, and is currently not widely accepted.

⁴⁷⁵ Opinion of Advocate General Mazák in European Court of Justice, *Case of Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, delivered on 15 September 2009, § 63.

⁴⁷⁶ European Court of Justice, *Meki Elgafaji v. Staatssecretaris van Justitie*, Case C-465/07, Judgement of the Grand Chamber of 17 February 2009, §28.

2.2.1.3. Adaptation of the Qualification Directive

Apart from interpreting the Qualification Directive more broadly, the ongoing amendment process of the Directive opens the possibility to amend Article 15 in order to explicitly include other categories of displaced persons in need of international protection. During the drafting process of the Directive, the European Parliament seemed to be in favour of the adaptation of instruments and policies in the context of environment-induced displacement⁴⁷⁷. However, at this moment, there does not seem to be any political support for an amendment of the Qualification Directive in that sense. While the principle of *non-refoulement* in relation to socio-economic living conditions could, in theory, act as a possible basis for the elaboration of a regional asylum regime for environmentally-displaced persons, in practice, such a development currently still seems an unattainable ideal.

Besides, it is important to stress that the Qualification Directive would only be of interest to a very limited number of environmentally-displaced persons⁴⁷⁸. As mentioned above, most persons displaced by environmental disasters will not reach Europe's borders, and can therefore not apply for subsidiary protection. Furthermore, Member States may exclude subsidiary protection if in a part of the country of origin there is no real risk of suffering serious harm and the applicant "can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there"⁴⁷⁹. This criterion of the lack of an 'internal flight alternative' can easily be met in the case of sinking island states in the Pacific, but more difficult in the case of most sudden-onset natural disasters, or inundations due to sea level rise in large countries such as Bangladesh. Furthermore, requirements regarding the actors of the "serious harm" make the possibility to apply the Qualification Directive in the context of migration and environmental change doubtful. According to the Qualification Directive, "actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

⁴⁷⁷ European Parliament, Report of 8 October 2002 on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001)510 – C5-0573/2001 – 2001/0207(CNS), Committee on Citizen's Freedoms and Rights, Justice and Home Affairs, Rapporteur: Jean Lambert; V. Kolmannskog, 'Climate change-related displacement and the European response', Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009.

⁴⁷⁸ A. Lopez, 'The Protection of Environmentally-Displaced Persons in International Law', 37 *Environmental L.* 365, 2007, p. 399-400.

⁴⁷⁹ Article 8 of the 2011 Qualification Directive.

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7⁴⁸⁰.

It seems from this exhaustive enumeration that the ‘serious harm’ must result from man-made situations, and not for example from ‘purely’ *natural* disasters, such as earthquakes or volcanic eruptions. Lastly, due to the longer-term character of the protection status, as well as the individual assessment of asylum claims, subsidiary protection would not be the most suited option for victims of sudden-onset environmental disasters, where a temporary regime of asylum-like protection based on group- instead of individual assessments would be more appropriate.

2.2.2. The Temporary Protection Directive

Another form of complementary protection in the EU is provided by the Temporary Protection Directive of 2001⁴⁸¹. Due to the Balkan conflicts in the 1990s, the EU faced an increased occurrence of mass influxes of forcibly displaced persons. These displacement crises demonstrated that the asylum systems of individual Member States were not equipped to deal with mass flows of displaced persons. In the aftermath of the Balkan conflicts, European leaders acknowledged that special procedures to deal with mass influxes are necessary to avoid overburdening of the national asylum systems, and yet still provide basic protection for displaced persons. Furthermore, the Member States wanted to share the ‘burden’ of receiving displaced persons⁴⁸².

On the basis of solidarity between Member States, the Temporary Protection Directive was adopted in 2001, in order to provide temporary protection to displaced persons without overburdening the Member States⁴⁸³. The aim was to provide immediate emergency protection from *refoulement*, by granting certain categories of displaced persons arriving on the EU territory a legal status. This

⁴⁸⁰ Article 6 of the Qualification Directive.

⁴⁸¹ European Council, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *Official Journal* L 212 of 7 August 2001, p. 12–23 (hereafter: Temporary Protection Directive).

⁴⁸² V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 316; S. Peers and N. Rogers (eds.), *EU Immigration and asylum Law. Text and Commentary*, Martinus Nijhoff Publishers. Leiden, 2006, p. 456-461.

⁴⁸³ Article 2(a) of the Temporary Protection Directive.

Directive was the first legally binding asylum instrument adopted under Title IV of the EC Treaty⁴⁸⁴. The Member States had until 31 December 2002 to transpose the provisions of the Directive into their national laws.

The Directive established a protection regime for displaced persons in situations of ‘mass influx’, namely when the influx of displaced persons is so big that the asylum systems cannot efficiently cope with all persons involved on an individual basis⁴⁸⁵. For the purpose of the Directive, ‘displaced persons’ are

“third-country nations or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

- (i) Persons who have fled areas of armed conflict or endemic violence;
- (ii) Persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights”⁴⁸⁶.

Environmentally-displaced persons are not explicitly mentioned in the Directive. During the negotiations, Finland had repeatedly advocated the explicit inclusion of persons displaced by natural disasters in Article 2(c). However, arguing that “such situations were not mentioned in any international instrument on refugees”, opponents of the Finnish proposal prevented the explicit inclusion of environmentally-displaced persons in the Temporary Protection Directive⁴⁸⁷.

⁴⁸⁴ S. Peers and N. Rogers (eds.), *EU Immigration and asylum Law. Text and Commentary*, Martinus Nijhoff Publishers. Leiden, 2006, p. 453. The legal basis for the adoption of the Temporary Protection Directive is Article 63, 2(a) and (b) of the Treaty establishing the European Community (TEC).

⁴⁸⁵ Article 2 (a) of the Temporary Protection Directive; V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009.

⁴⁸⁶ Article 2(c) of the Temporary Protection Directive.

⁴⁸⁷ Council of the European Union, ‘Outcome of proceedings of the Working Party on Asylum on 5, 12 and 13 January 2001 on the Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof’, Doc. 6128/01, Brussels, 16 February 2001, available at: <http://register.consilium.europa.eu/pdf/en/01/st06/st06128.en01.pdf>, p. 4; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 316.

Nevertheless, the Directive has left a large room for interpretation, offering protection to displaced persons “unable to return in safe and durable conditions”⁴⁸⁸. In particular the definitions of key terms such as ‘mass influx’ have been kept vague and wide. Article 2(d) defines a ‘mass influx’ as an “arrival in the Union of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Union was spontaneous or aided, for example through an evacuation programme”⁴⁸⁹. As the Directive does not provide an exhaustive list of situations leading to a ‘mass influx’, natural disasters could qualify as situations where people *are unable to return in safe and durable conditions*⁴⁹⁰. Since severe environmental destructions could constitute a threat for human rights protection, environmentally-displaced persons could furthermore also fall under the example given in Article 2(c)(ii), which grants protection in case of “systematic or generalised violations of (...) human rights”⁴⁹¹. In its recently released Staff Working Document on ‘Climate change, environmental degradation, and migration’, even the European Commission does not exclude the Temporary Protection Directive to be applicable in the context of environment-induced displacement⁴⁹².

Even though the Temporary Protection Directive may apply to victims of severe environmental changes, there are some disadvantages to it. Firstly, the protection given under the Directive is limited in time. The normal duration is one year, with a maximum possible extension up to three years⁴⁹³. However, reconstruction after certain natural disasters can take longer than 3 years, and in case of gradual environmental degradation due to climate change, a displaced person can in most cases never return to his or her region of origin. The Temporary Protection Directive is thus most suited after severe sudden-onset disasters, such as floods, where the possibility of return in the

⁴⁸⁸ Article 2(c) of the Temporary Protection Directive.

⁴⁸⁹ Article 2(d) of the Temporary Protection Directive.

⁴⁹⁰ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 395; V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 316-317; J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 39.

⁴⁹¹ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 317.

⁴⁹² European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19.

⁴⁹³ Article 4 of the Temporary Protection Directive.

short- or medium-term remains open, but is of limited assistance to persons not in a position to return to their region of origin in the near future⁴⁹⁴. The maximum duration of three years even seems incompatible with the obligation for Member States to apply temporary protection “with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement”, as provided for in Article 3(2) of the Directive⁴⁹⁵. And although Article 22 obliges the Member States to consider any compelling humanitarian reasons which may make an enforced return impossible or unreasonable, it does not oblige states to give residence permits in such a case⁴⁹⁶. Furthermore, the Directive only gives temporary protection in case of a ‘mass influx’⁴⁹⁷. As a result, it only provides temporary relief to a very limited proportion of environmentally-displaced persons. After all, victims of sudden-onset natural hazards often do not migrate far away from their region of origin⁴⁹⁸. And persons displaced by gradual environmental degradation are even less likely to arrive in a situation of mass influx than victims of sudden natural disasters⁴⁹⁹.

Another concern is the fact that it is doubtful whether the Directive also grants protection to persons already residing in the EU, and who are *unable to return in safe and durable conditions*, because the situation prevailing in their country of origin has invoked a mass influx of displaced persons to the Union. More concretely, suppose the Directive was activated to provide temporary protection to the victims of the Pakistan floods in 2011, could it then also lead to a temporary residence status for those Pakistani which were already (irregularly) residing in a European country at the time of the floods? Similar to the reasoning above concerning the limited application of the Temporary Protection Status in the USA, there should be no difference in treatment between those arriving after the disaster has occurred, and those who already reside in the country, but cannot return due to the effects of the environmental disaster.

Lastly, the most important obstacle for the application of the Temporary Protection Directive in the context of environment-induced displacement lies at the political level. Whether or not the

⁴⁹⁴ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 395-396.

⁴⁹⁵ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 37 *Environmental L.* 365, 2007, p. 395.

⁴⁹⁶ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 318.

⁴⁹⁷ Article 2 (d) of the Temporary Protection Directive.

⁴⁹⁸ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 20.

⁴⁹⁹ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 317.

Temporary Protection Directive applies in a particular case is decided by the Council on a case-by-case basis⁵⁰⁰. However, up till now, the Directive has never been invoked, not even for the mass influx situations described in Article 2(c). Even when the so-called 2011 “Arab Spring” of popular uprisings against dictatorial and undemocratic regimes in North Africa and the Middle East led to increased flows of displaced persons from North African countries such as Tunisia and Libya to Southern European countries, calls to apply the Temporary Protection Directive were left unheard. And even now, when the war in Syria confronts the world with one of the most severe refugee crises of the past decades, it has become clear that the Directive will not be activated to provide protection to Syrians fleeing the violence in their country. It thus seems an extremely difficult task to find the “political will and agreement” to invoke the Directive in an even more contested context such as environment-induced displacement⁵⁰¹.

In sum, the European Temporary Protection Directive, which remained dead letter law up till now, could be important to provide temporary relief to a limited amount of environmentally-displaced persons. Taking the above described limitations in mind, it could thus be recommended to activate the Directive in case severe sudden-onset environmental disasters lead to a mass influx of displaced persons to the EU.

2.3. National complementary protection statuses and practices in the European Union

2.3.1. National complementary protection regimes

Even though the above discussed EU complementary protection regimes stay without effect so far in the context of environment-induced displacement, it is worthwhile to take a look at their implementation in the legislation and practice of individual Member States. On the basis of Article 3 of the Qualification Directive, European Member States can introduce more favourable standards for determining who is eligible for subsidiary protection. This has led to a wide range of different

⁵⁰⁰ Article 5 of the Temporary Protection Directive.

⁵⁰¹ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 317.

national legislation and practices concerning the granting of harmonised and non-harmonised protection statuses in the EU⁵⁰². Some European Member States have even included provisions in their asylum legislation regarding persons which are unable to return to their country or origin due to an environmental disaster⁵⁰³.

In Sweden for example, persons “unable to return to the country of origin because of an environmental disaster” also qualify for subsidiary protection⁵⁰⁴. Sweden thereby expanded the protection offered by Article 15 of the Qualification Directive. While the Swedish *travaux préparatoires* refer to an expected increase of permanent climate change-induced displacement, for example in the case of “sinking islands”, the drafting history further reveals that the scope of this protection is limited to sudden-onset environmental disasters⁵⁰⁵. Furthermore, there is still a possibility to restrict the application of this protection regime if Sweden’s absorption capacity is overwhelmed⁵⁰⁶.

The Swedish decision to extent the possibility to grant subsidiary protection to victims of environmental disasters was, unfortunately, criticised by the UNHCR, which did not consider environmental grounds to be included in the protection regime of the 1951 Refugee Convention. The

⁵⁰² European Migration Network (EMN), ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Synthesis Report, December 2010, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf.

⁵⁰³ V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009; European Migration Network (EMN), ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Synthesis Report, December 2010, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf, p. 87-88.

⁵⁰⁴ Chapter 4, Section 2(3), Swedish Aliens Act 2005:716, issued on 29 September 2005, entered into force on 31 March 2006, English version available at: <http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf>; V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009.

⁵⁰⁵ Swedish *travaux préparatoires* 1995/75: 147 and Proposition 1996/97:25, in V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 323, note 36; European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on ‘An EU Strategy on adaptation to climate change’, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 18.

⁵⁰⁶ Chapter 5, Section 25, Swedish Aliens Act 2005:716, issued on 29 September 2005, entered into force on 31 March 2006, English version available at: <http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf>; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 322-323.

organisation feared that granting subsidiary protection to this category of persons in need of humanitarian assistance would undermine the international protection regime for refugees⁵⁰⁷.

Another example is to be found in the Finnish asylum legislation, under which

“An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds (...) for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an *environmental catastrophe* or a bad security situation (...)”⁵⁰⁸. [emphasis added]

While in Sweden, an “environmental disaster” constitutes an additional ground for *subsidiary protection*, in Finland, protection for victims of environmental disasters is granted in the form of *humanitarian protection*. While there are currently no judicial criteria to apply this protection ground, a government bill has referred to an “environment [that] has become unusable for residential purposes or hazardous to person’s health”⁵⁰⁹. According to the *travaux préparatoires*, both natural and human-induced disasters would be included, making Section 88a less restrictive than the above discussed Swedish provision⁵¹⁰.

Remarkably, Finland has also extended temporary protection in case of environmental disasters⁵¹¹. Section 109 of The Finnish Aliens Act grants temporary protection to persons

“who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an *environmental disaster*”⁵¹². [emphasis added]

⁵⁰⁷ UN High Commissioner for Refugees (UNHCR), ‘Asylum in the European Union. A study on the implementation of the Qualification Directive’, November 2007, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=473050632>, p. 68.

⁵⁰⁸ Chapter 6, Section 88a, Finnish Aliens Act 301/2004, English version available at: <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>.

⁵⁰⁹ Government Bill 323/2009 in European Migration Network (EMN), ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Synthesis Report, December 2010, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf, p. 87.

⁵¹⁰ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 104; European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 18.

⁵¹¹ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 318.

⁵¹² Chapter 6, Section 109(1), Finnish Aliens Act 301/2004, English version available at: <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>.

At this moment, Finland is the only European Member State which explicitly foresees temporary protection for environmentally-displaced persons⁵¹³. According to Section 109 of the Finnish Aliens Act, which covers the European Temporary Protection Directive 2001/55/EC, it is the Finnish government which “decides in a plenary session on population groups that may be given temporary protection and on the period when residence permits may be issued on the basis of temporary protection”⁵¹⁴. However, this rather complex and lengthy procedure has also proven to be a “dead letter” protection regime (*see further below in Section 2.3.2.1.*)⁵¹⁵.

Important to note though is the fact that all of these legal provisions have never been applied up till now in the context of environment-induced displacement⁵¹⁶. So arguing that countries like Finland and Sweden offer asylum to environmentally-displaced persons goes a step too far. However, while most countries have no such explicit provisions for victims of environmental disasters in their asylum legislation, some do offer them protection in practice.

2.3.2. State practices regarding environment-induced displacement

2.3.2.1. Implicit and *ad hoc* humanitarian protection

Aside from the legislative protection regimes discussed above, states sometimes grant protection to victims of natural disasters through implicit humanitarian protection or *ad hoc* humanitarian

⁵¹³ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19.

⁵¹⁴ Chapter 6, Section 109(2), Finnish Aliens Act 301/2004, English version available at: <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>.

⁵¹⁵ European Migration Network (EMN), ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Country Report of Finland, Helsinki, 2 October 2009, available at: http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=A51068D6A1625CFCB6DC4FE842D3821B?entryTitle=13_ The different national practices concerning granting of NON-EU HARMONISED PROTECTION STATUSES, p. 11.

⁵¹⁶ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 18-19.

schemes. Many European Member States have asylum or migration regimes in place, which give a permission to remain or a residence status on the basis of a discretionary decision of the competent minister⁵¹⁷. In the context of environment-induced displacement, the question rises whether such provisions could be applied to provide protection to persons unable to return to a destructed region of origin.

As discussed above, the Finnish Aliens Act has extended the European concept of temporary protection to persons who cannot return safely to their country of origin because there has been a massive displacement of people as a result of an environmental disaster⁵¹⁸. However, this provision has never been applied in practice. Instead, in case of environmental disruptions, it has been circumvented by Section 51 of the Finnish Aliens Act, which is used when irregular residents cannot actually be returned to their country of origin. Under Section 51(1):

“Aliens residing in Finland are issued with a temporary residence permit if they cannot be returned to their home country or country of permanent residence for temporary reasons of health or if they cannot actually be removed from the country”.

This provision was for example applied in the period 2004-2006 for the Afghan, Somali and Iraqi nationals who did not fall under any grounds for asylum, subsidiary protection or any other residence permit⁵¹⁹. As for environment-induced migration, Section 51 was used to provide protection to Sri Lankan victims of the 2004 tsunami in the Indian Ocean. In fact, the tsunami was not even considered as an “environmental disaster” in the meaning of Section 109 regarding temporary protection⁵²⁰. Apparently, using Section 51 as an implicit form of protection for victims of natural disasters receives

⁵¹⁷ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 18.

⁵¹⁸ Chapter 6, Section 109(1), Finnish Aliens Act 301/2004, English version available at: <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>.

⁵¹⁹ European Migration Network (EMN), ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Country Report of Finland, Helsinki, 2 October 2009, available at: http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=A51068D6A1625CFCB6DC4FE842D3821B?entryTitle=13_ The different national practices concerning granting of NON-EU HARMONISED PROTECTION STATUSES, p. 12.

⁵²⁰ European Migration Network (EMN), ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Country Report of Finland, Helsinki, 2 October 2009, available at: http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=A51068D6A1625CFCB6DC4FE842D3821B?entryTitle=13_ The different national practices concerning granting of NON-EU HARMONISED PROTECTION STATUSES, p. 11-12.

less political resistance than using the national temporary protection regime, which explicitly grants a residence permit in case of an environmental disaster.

Another interesting example is to be found in Denmark, which has applied its provisions on humanitarian protection⁵²¹ to the context of environmental degradation. Through a wide application of the Danish “survival criteria”, Denmark has issued residence permits to asylum seeking families with children from certain regions in Afghanistan, where serious droughts had severely affected them, and food insecurity had made their return impossible⁵²².

Aside from granting humanitarian protection on the basis of such implicit legal provisions based on discretionary humanitarian grounds, states have in the past also granted protection in case of humanitarian disasters on a purely *ad hoc* basis. Often, these measures were group-based, and provided the beneficiaries with a temporary residence status. In order to respond to a mass influx of displaced persons from the former Yugoslavia due to the conflicts in the 1990s, the Belgian government has for example granted protection in an *ad hoc* way through ministerial circulars, which laid down guidelines regarding the targeted group, the scope of the protection and the status and the rights attached⁵²³. Other countries granted such *ad hoc* immigration concessions after a natural disaster had occurred⁵²⁴. Often, a particular historical or cultural link with a population affected by a natural disaster leads to “humanitarian goodwill” towards the displaced people⁵²⁵. After the volcanic

⁵²¹ Danish Aliens Act, Consolidated version N° 945 of 1 September 2006, English version available at: <http://legislationline.org/topics/country/34/topic/10>, Section 9b.

⁵²² European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19; V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009.

⁵²³ Belgian National Contact Point of the European Migration Network (EMN), ‘EU and Non-EU Harmonised Protection Statuses in Belgium’, Country Report of Belgium for the EMN study on ‘The different national practices concerning granting of non-EU harmonised protection statuses’, Brussels, December 2009, available at: [http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=A51068D6A1625CFCB6DC4FE842D3821B?entryTitle=13_The different national practices concerning granting of NON-EU HARMONISED PROTECTION STATUSES](http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=A51068D6A1625CFCB6DC4FE842D3821B?entryTitle=13_The%20different%20national%20practices%20concerning%20granting%20of%20NON-EU%20HARMONISED%20PROTECTION%20STATUSES), p. 24-25. Examples of such ministerial circulars are: Circular of 27 October 1997 regarding the granting of a permit for unlimited stay to displaced persons from Bosnia-Herzegovina, *B.S.* 18 November 1997; Circular of 19 April 1999 regarding the special status of temporary protection for and the reception of refugees from Kosovo, *B.S.* 20 April 1999; Circular of 17 May 1999 regarding Kosovo family members of persons residing in Belgium, *B.S.* 18 June 1999.

⁵²⁴ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 317-318.

⁵²⁵ J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to

eruptions in Montserrat in 1995, the United Kingdom has for example installed a voluntary evacuation programme, giving Montserratians a “Two Years Exceptional Leave to Remain in the UK”⁵²⁶. Similarly, some non-European states have granted special immigration concessions to the victims of the tsunami in the Indian Ocean in 2004⁵²⁷. However, when most European Member States took measures in this regard, they chose not to grant any legal status to the persons concerned, but merely to suspend their return.

2.3.2.2. The practice of “non-returns”

Up till now, the principle of *non-refoulement* has not been accepted by the European Courts in cases of environment-induced displacement. However, in practice, considerations based on the principle of *non-refoulement* have been applied in situations of natural disasters. For example, in the aftermath of the 2004 tsunami, the UNHCR called for the suspension of returns to the affected regions, which was widely respected⁵²⁸. Similarly, in 2010, some European countries have decided not to forcibly return aliens irregularly staying on their territory to Haiti after the earthquake or to Pakistan after the floods. While such state practices do offer some form of protection to persons coming from regions affected by natural disasters, they are clearly insufficient, as they do not entail any legal obligation on the part of the state to grant those persons a legal status (*see further below in Section 3.1.*). Furthermore, these practices are completely discretionary, making their application depended on the goodwill of the government in place.

However, these practices show that there is some willingness among European states to apply the human rights-based *non-refoulement* principle in situations where an environmental disaster has

25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 41-42.

⁵²⁶ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 19; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 318.

⁵²⁷ J. McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.unhcr.org/4dff16e99.pdf>, p. 42.

⁵²⁸ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 323-324.

rendered a forced return to the affected region extremely difficult. There might thus be an opening to install a legislative protection regime for victims of natural disasters in the EU.

3. DEVELOPING A PROTECTION REGIME FOR ENVIRONMENTALLY-DISPLACED PERSONS?

3.1. Prohibition to expel or right to stay?

The protection regimes discussed above vary enormously as to the attached rights. While the Qualification Directive obliges states to grant a legal status to persons eligible for protection, there is no comparable status attached to the recognition of protection under customary or conventional provisions of *non-refoulement*⁵²⁹. The principle of *non-refoulement* does not clarify whether persons which cannot be returned, are entitled to legal residency, leaving these individuals often in an illegal residence status⁵³⁰.

States could consequently be tempted to favour human rights-based protection over subsidiary protection, in order to avoid obligations beyond the prohibition to return a person⁵³¹. We must therefore be careful that such a differentiation of protection does not lead states to rule out subsidiary protection for categories of persons who could fall within Article 15 of the Qualification Directive. Persons eligible for subsidiary protection should be granted a legal status, and not mere protection against a forced return.

Through a creative and arguable use of human rights, it could even be argued that individuals which cannot be '*refouled*', should be granted legal residency in the host country. On the ground of Article

⁵²⁹ J. McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection', in J. McAdam (ed.), *Forced Migration, Human Rights and Security*, Hart Publishing, Oxford, 2008, 302p., p. 267; N. Mole, *Asylum and the European Convention on Human Rights*, 4th ed., Council of Europe Publishing, Strasbourg, 2007, p. 106.

⁵³⁰ V. Kolmannskog and F. Myrstad, 'Environmental Displacement in European Asylum Law', 11 *European Journal of Migration and Law*, 2009, p. 324-325; J. McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection', in J. McAdam (ed.), *Forced Migration, Human Rights and Security*, Hart Publishing, Oxford, 2008, 302p., p. 266, 268-270.

⁵³¹ J.-F. Durieux, 'Salah Sheekh is a Refugee. New insights into Primary and Subsidiary Forms of Protection', Refugee Studies Centre Working Paper Series No. 49, October 2008, available at: <http://www.rsc.ox.ac.uk/PDFs/RSCworkingpaper49.pdf>, p. 7.

8 ECHR, the European Court of Human Rights ruled that the failure to regularise amounts to a violation of the physical and moral integrity of a person⁵³². According to the Court, “[i]t is not enough for the host state to refrain from deporting the person concerned; it must also by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference”⁵³³. Additionally, on the ground of Article 3 ECHR, it is arguable that the prospect of a permanent irregular status, while one cannot be returned, could be considered as degrading treatment. After all, illegal residency often brings along deprivation, lack of social benefits, and homelessness⁵³⁴. The prohibition of degrading treatment would then “prohibit a state from leaving anyone within its jurisdiction in conditions of complete destitution in the same way that expulsion to face destitution was found to violate Article 3 in *D. v. the United Kingdom*”⁵³⁵.

3.2. Developing a *sui generis* regime or adapting existing legislation?

The study above of European and national legislative and non-legislative protection regimes shows that there is still a protection gap for people displaced across international borders due to gradual or sudden changes in their natural environment. For victims of sudden-onset natural disasters, states clearly prefer to offer “protection” on the basis of *ad hoc* humanitarian schemes instead of legislative protection regimes, even though *ad hoc* protection is insufficient, inconsistent and unpredictable⁵³⁶. For those displaced due to gradual degradation processes, the protection gap is even bigger, as there is simply no political willingness at all to offer protection.

As shown in Chapter I of this study, one of the shortcomings of the existing legal research on environment-induced migration, are the attempts to treat the issue as “a single phenomenon that can be discussed in a general way”⁵³⁷. However, the classification proposed above (*see Chapter I*,

⁵³² European Court of Human Rights, *Case of Sisojeva v. Latvia*, Application No. 60654/00, Grand Chamber Judgement of 15 January 2007.

⁵³³ European Court of Human Rights, *Case of Sisojeva v. Latvia*, Application No. 60654/00, Chamber Judgement of 16 June 2006, § 104.

⁵³⁴ J. McAdam, ‘The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection’, in J. McAdam (ed.), *Forced Migration, Human Rights and Security*, Hart Publishing, Oxford, 2008, 302p., p. 265.

⁵³⁵ N. Mole, *Asylum and the European Convention on Human Rights*, 4th ed., Council of Europe Publishing, Strasbourg, 2007, p. 109.

⁵³⁶ As shown by Jane McAdam through numerous domestic examples in J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 99-118.

⁵³⁷ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 186.

Section 1.3.) demonstrates the existence of a wide variety of origins and types of environment-induced population movements. Consequently, a “one-size-fits-all approach” cannot provide an adequate answer to the different challenges posed by this variety of population movements⁵³⁸. It is clear that it is only by treating them differently, adapted to the specific circumstances of the movement as well as the needs of migrants and displaced persons, that a comprehensive and suitable approach to the issue is possible.

As mentioned above, a wide range of authors has discussed how to fill the protection gap for people displaced across international borders due to environmental harm. Within this discussion, a lot of attention has been devoted to the question whether legal protection for environmentally-displaced persons could and should be couched into a *sui generis* regime, specifically developed for the protection of people displaced for environmental reasons. Yet the majority of authors generally agrees that a global – *sui generis* – framework for environmentally-displaced persons is not an appropriate legal solution. Not only is such a global framework politically difficult to achieve, it is also considered inappropriate and unsuitable⁵³⁹. Advocacy for a new, stand-alone treaty for environmentally-displaced persons ignores the fact that environmental disruptions are difficult, if not impossible, to isolate as the sole driver of migration or displacement. According to McAdam, this may create problems in defining the legal scope and application of such an instrument, and might even cause for those intended to be protected to fall outside of its scope⁵⁴⁰.

Instead of creating a new – *sui generis* – instrument, it is argued that legal solutions for the protection of environmentally-displaced persons could and should be found in “existing international relationships, legal agreements and institutions”⁵⁴¹. Furthermore, various authors recently argued for the creation of soft law instruments regarding environment-induced migration, after the example of the Guiding Principles on Internal Displacement⁵⁴². Analysing the conceptual and pragmatic

⁵³⁸ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 186-187.

⁵³⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 20.

⁵⁴⁰ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 187.

⁵⁴¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 20.

⁵⁴² Guiding Principles on Internal Displacement (GPID), Commission on Human Rights of the Economic and Social Council in its Fifty-fourth session, UN Doc. E/CN.4/1998/53/Add.2., 11 February 1998 (hereafter: Guiding Principles on Internal Displacement). J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 187; K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and

challenges of constructing a legal instrument regarding climate-induced migration, Jane McAdam for example proposes the development of 'Guiding Principles' on the issue, which she presents as a "preliminary step towards a binding legal instrument, or simply a helpful tool to assist governments in responding to potential and/or actual displacement"⁵⁴³. According to the Foresight researchers, such a bottom-up approach, creating a soft law framework, is better suited to build consensus among states regarding the protection of environmentally-displaced persons⁵⁴⁴.

Nonetheless, the above described state practices in the aftermath of natural disasters show that there is some willingness among European states to apply the human rights-based *non-refoulement* principle in situations where an environmental disaster has rendered forced returns to the affected region extremely difficult. There might thus already be an opening to grant legislative protection to victims of natural disasters in the EU. In this sense, a decision of the Council to apply the Temporary Protection Directive in case a severe sudden-onset disaster would lead to a mass influx of displaced persons to the EU would offer some possibilities.

An interesting comparison can be made here with the USA's TPS regime (*as discussed above in Section 2.1.*). However, this status is only granted to foreigners who are already residing in the USA at the time a natural disaster takes place in their country of origin. As a result, it does not offer any protection to victims who want to leave their country of origin or former habitual residence in the aftermath of the disaster. However, it is important to stress that the USA government went further than European governments in protecting people who could not return to Haiti as a result of the Port-au-Prince earthquake in 2010. While European states only decided to temporarily suspend returns to Haiti, the USA granted a residence and work permit to those Haitians who were already residing in the country. The TPS regime could thus serve as an example for European states, in order to further expand their practices and turn them into a legislative protection regime.

In contrast to the American TPS regime, the European Temporary Protection Directive grants residence permits to those who are "unable to return in safe and durable conditions" and arrive in Europe in a situation of mass influx⁵⁴⁵. When applying the Temporary Protection Directive in the case of a natural disaster, the Council Decision deciding on the application of the Directive in a particular case should not only designate the group of displaced persons arriving to the European territory after

Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 14.

⁵⁴³ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 187.

⁵⁴⁴ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 20.

⁵⁴⁵ Article 1 and 2(c) of the Temporary Protection Directive.

the disaster has occurred as beneficiaries for protection, but also those which can – temporarily - not return due to the situation prevailing in their country of origin.

3.3. Elements for a legislative protection regime for environmentally-displaced persons

Even though the elaboration of a legislative protection regime for environmentally-displaced persons lies outside the scope of this research, some elements are identified here that are relevant for the protection of environmentally-displaced persons, and should thus be incorporated in such a legislative protection regime.

Under most international or regional protection regimes, such as the European Qualification Directive, as well as most national asylum systems, asylum applications must be evaluated on an individual basis. However, such assessments are not the most suited way to evaluate the need for protecting people which are not able to return to their region of origin for environmental reasons. Unlike acts of torture or persecution in the meaning of the 1951 Refugee Convention, environmental damage is usually widespread and affects entire groups of a population. Therefore, it is better to apply group-based protection regimes for environmentally-displaced persons, which results in the presumption that, in the absence of evidence to the contrary, individual members of that group are eligible for protection. An individual could then claim protection by establishing himself as a member of a designated group of persons affected by environmental harm, without having to demonstrate and individualise the specific reasons why an environmental disaster is personally affecting him.

Some of the legislative protection regimes discussed above, such as the American TPS regime and the European Temporary Protection Directive, offer protection based on the designation of a particular country or group of people as demonstrating sufficient objective features that make them eligible for protection. Likewise, some *ad hoc* responses, such as the UK's *ad hoc* protection for Montserratians after the volcanic eruption in 1995, and Belgium's *ad hoc* schemes during the crises in the Former Yugoslavia and Rwanda, offer protection based on group designation. Important to stress though is the fact that group-based protection regimes do not necessarily exclude individual circumstances to be taken into account. Independent authorities could for example designate a particular vulnerable group, such as families with young children or unaccompanied minors, as persons eligible for protection. Similarly, certain categories of particular vulnerable persons could benefit from a reduced

burden of proof in exceptional circumstances. This way, a protection regime could take the *non-refoulement* case law of the European Court of Human Rights regarding “exceptional circumstances” as in *D. v. United Kingdom*⁵⁴⁶, and the “particular vulnerable situation” of the persons concerned as in *M.S.S. v. Belgium and Greece*⁵⁴⁷ into account (*see above in Section 1.2.1.*).

However, while the American TPS regime and the European Temporary Protection Directive both have significant advantages for the protection of environmentally-displaced persons, the protection they offer is *in se* limited. They only grant temporary protection, and even exclude the beneficiaries from becoming permanent residents. However, victims of environmental disasters will in some cases not be able to return to their country of origin in the short to medium term, and some of them will never again be able to survive in a devastated, or vanished, region of origin. Therefore, the protection granted should be short-term when possible, and longer-term when needed.

Finally, it is crucial for the effectiveness of a protection regime for environmentally-displaced persons that its application in practice does not depend on a political decision. Both the American TPS regime and the European Temporary Protection Directive indeed suffer from a lack of effectiveness, due to the indecisiveness of the political organs responsible for their activation in a particular case. The latter has even remained dead letter up till now. In my opinion, independent, non-political specialised asylum authorities should be responsible to decide whether to grant protection to environmentally-displaced persons in a particular case. Furthermore, an international agency could be appointed to give advice on the need to apply legislative protection instruments in case of a particular environmental disaster. For instance, with Security Updates⁵⁴⁸ and Eligibility Guidelines⁵⁴⁹ the UNHCR currently advises countries on the application of complementary forms of protection to asylum-seekers from countries at war, such as Afghanistan. Likewise, a specialised agency could be appointed to decide, or at least advise, on when to apply protection regimes, such as the European Temporary Protection Directive, in case of environmental disasters.

⁵⁴⁶ European Court of Human Rights, *Case of D. v. The United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997.

⁵⁴⁷ European Court of Human Rights, *Case of M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011.

⁵⁴⁸ UN High Commissioner for Refugees (UNHCR), ‘Afghanistan Security Update Relating to Complementary Forms of Protection’, UNHCR Kabul, 6 October 2008, available at: <http://www.refworld.org/docid/48ea34872.html>.

⁵⁴⁹ UN High Commissioner for Refugees (UNHCR), ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’, July 2009, available at: <http://www.refworld.org/pdfid/4a6477ef2.pdf>.

4. INTERIM CONCLUSION

Severe environmental disruptions, whether gradually or sudden, may harm people on a fundamental level. They may force them to flee their homes in search of an inhabitable environment that can support their subsistence. Due to the effects of global warming, this issue is now more than ever urgent, as more and more people are expected to migrate or become displaced for environmental reasons. Future generations will therefore have to cope with increasing flows of environmentally-displaced persons. And although most of the affected people will not be able to move far away, an increasing number is expected to cross international borders.

Even though the debate on the legal protection gap for environmentally-displaced persons has been going on for decades, the international community has failed to create suitable legal solutions for the recognition and protection of this growing group of forced migrants. However, whether or not displaced persons receive asylum in the countries they flee to, should not be a matter of charity. This Chapter has aimed to discuss how the protection gap for environmentally-displaced persons could be closed in the EU.

The analysis above revealed some important developments in the human rights-based protection against a forced return to the country of origin. In particular the evolving interpretation of the notion of inhuman and degrading treatment in the removal context, and the extension of this notion to situations of socio-economic deprivation, might become interesting in the context of migration and environmental change. Case law on *non-refoulement* protection in relation to socio-economic rights seems to develop slowly in the direction of protection against inhuman and degrading living conditions in the country of origin. However, applying human rights to protect environmentally-displaced persons against return would go a colossal step further, and depends on the assessment made by human rights courts. Up till now, such a wide interpretation of the *non-refoulement* principle has not been accepted in this context. And it is not expected that this will change in the near future, in particular considering the fact that most persons displaced for environmental reasons will not be able to reach a human rights court. Furthermore, human rights-based protection depends on individual assessments of the particular situation of the persons concerned, while a group-based protection regime would be more suited for most categories of environmentally-displaced persons.

As for the EU's complementary protection regimes, it has to be concluded that these are currently not suitable to protect persons arriving or residing in Europe which cannot return to their home

country because of an environmental disaster. While the Qualification Directive has explicitly limited the provision of subsidiary protection to three categories of displaced persons – none of which, under the current interpretation of the law, apply to environment-induced displacement – the Temporary Protection Directive still remains dead letter law.

However, some examples of national legislation protecting victims of environmental disasters, the practice of “non-returns” in the aftermath of sudden natural disasters, as well as the described evolutions in the interpretation of the *non-refoulement* principle in the context of socio-economic deprivation, may establish evidence of a political momentum for the elaboration of a legislative protection framework for environmentally-displaced persons in Europe. In that case, the evolving interpretation of *non-refoulement* protection in case of inhuman and degrading living conditions could act as a new ground for the elaboration of a protection framework. In particular the activation of the Temporary Protection Directive might provide suitable and sufficient protection to victims of sudden-onset environmental disasters, provided it grants protection to persons arriving in a mass influx, as well as to those already residing on the European territory and which cannot return due to the said disaster. However, this is not a satisfying solution for those environmentally-displaced persons which need to be permanently relocated, nor for those who do not arrive in situations of ‘mass influx’. In particular those who are permanently displaced due to gradual environmental degradation are not covered by the Temporary Protection Directive. Filling the legal protection gap for them will remain the biggest challenge.

As states tend to be more willing to accept persons on the basis of *ad hoc* humanitarian schemes or decisions, instead of relying on a human rights-based legislative protection regime⁵⁵⁰, several authors now suggest creating a soft law instrument relating to environment-induced migration, to guide national and international policies on the topic⁵⁵¹. Since several recent developments show an increased awareness of the problem of environment-induced migration and displacement, the possibility, practical feasibility and added value of such an instrument is certainly worth further discussion. And in order for such a soft law instrument to offer a comprehensive and sustainable solution, it would have to include provisions regarding the protection of environmentally-displaced persons crossing international borders.

⁵⁵⁰ M. Foster, ‘Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’, *New Zealand Law Review*, 2009 PART II, p. 260.

⁵⁵¹ See for example J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012.

Finally, it is important to realise that in reality, the need for asylum-like protection is not the only challenge in the context of environment-induced human mobility⁵⁵². Given the empirical evidence on the nature of environment-induced population movements, as discussed in Chapter I of this study, it is unlikely that European countries would be confronted with massive inflows of environmentally-displaced persons in the near to medium-term future. Other policy measures, such as the facilitation of international adaptive migration (*see above in Chapter II*) will thus be needed in order to manage environment-induced migration in the future.

⁵⁵² European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on 'An EU Strategy on adaptation to climate change', SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 18.

PART II

International environmental law as a legal framework for international adaptive migration

The international community has long recognised that worldwide environmental changes affect national and international migration patterns. Sudden natural hazards, such as floods, earthquakes and hurricanes are forcing millions of people out of their houses, while slow-onset environmental degradation, such as desertification, biodiversity loss and sea level rise, seriously threatens people's livelihoods around the world. However, even though the issue of environment-induced human mobility has already received a great deal of academic attention, the way to tackle the issue remains unclear. From a legal perspective, the absence of a clear definition and a legal status make it difficult to decide which legal framework should be applied to address this issue. This Part aims to analyse the issue of environment-induced migration and displacement from the perspective of international environmental law. More in particular, it sets out to discuss the legal and practical relevance of international environmental law for this issue, and delivers some policy recommendations.

In 1992, the issue of environment-induced migration and displacement was not addressed as a major concern at the Rio Earth Summit. From the three new forums addressing environmental and development concerns initiated in Rio, only the Convention to Combat Desertification (UNCCD)⁵⁵³ paid modest attention to environment-induced migration⁵⁵⁴. Neither the UNFCCC⁵⁵⁵, nor the Biodiversity Convention (CBD)⁵⁵⁶, explicitly referred to the phenomenon of environment-induced human mobility. However, since the Intergovernmental Panel on Climate Change highlighted migration and displacement as consequences of global warming in 1990, governmental and non-governmental organisations, together with academics and some developing countries, have been advocating to bring climate-induced migration under the umbrella of international environmental law, more in particular under international climate law. Supported by an emerging knowledge base on environment-induced migration, the humanitarian community finally managed to put climate-induced mobility on the negotiation table, and in 2010 at COP16 in Cancun, the issue appeared for the first time in an official COP decision under the UNFCCC regime.

Chapter IV describes how migration has entered international climate law, and examines the implications and added value of a migration-related provision in the UNFCCC regime. It sets out to analyse the legal value of paragraph 14(f) of the Cancun Adaptation Framework, and aims to provide guidance for the implementation of this provision through the UNFCCC adaptation framework. Then,

⁵⁵³ United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), adopted on 17 June 1994, entered into force on 26 December 1996, 1954 *UNTS* 3.

⁵⁵⁴ Prologue, Articles 10 and 17 of the UNCCD.

⁵⁵⁵ United Nations Framework Convention on Climate Change (UNFCCC), adopted on 9 May 1992 in New York, entered into force on 21 March 1994, 1771 *UNTS* 107.

⁵⁵⁶ The Convention on Biological Diversity (CBD), adopted on 5 June 1992 in Rio de Janeiro, entered into force on 29 December 1993, 1760 *UNTS* 79 (hereafter: Biodiversity Convention).

Chapter V scrutinizes other branches of international environmental law, which have received much less attention, both in the academic world as in policy circles. It aims to address this policy and research gap by assessing whether migration can and should also be incorporated into the frameworks of the CBD and the UNCCD. Finally, this Part concludes by evaluating whether international environmental law is the appropriate legal framework to address environment-related human mobility, and whether a sectoral approach should be preferred over a general framework to address the issue under international environmental law.

Chapter IV. Climate-induced migration in the international climate change framework

“Climate change is today one of the main drivers of forced displacement, both directly through impact on environment – not allowing people to live any more in the areas where they were traditionally living – and as a trigger of extreme poverty and conflict”.

Antonio Guterres, UN High Commissioner for Refugees⁵⁵⁷

Although environment-induced migration is not a new phenomenon, it has received renewed attention during the past few decennia due to urgent calls for the case of so-called “climate refugees”. While the legal and policy debate was first mainly based on human rights law and migration law, the past few years, the focus has shifted towards international climate law as the legal framework to address climate-induced human mobility. More specifically, the UNFCCC⁵⁵⁸ has received a lot of attention. Consequently, the question rises whether international climate law is the appropriate legal framework to address environment-induced migration.

This Chapter sets out to answer this question by scrutinizing the emergence, implementation and added value of the first migration-related provision in the UNFCCC regime, adopted in 2010 in Cancun. Before getting into the more legal questions, Section 1 briefly touches upon the development of the international climate change framework, and describes how and why migration has entered the UNFCCC regime. Section 2 then focuses on the treatment of migration, displacement and relocation in the Cancun Adaptation Framework, discussing the content, legal value and implementation of paragraph 14(f) of the Cancun Agreements⁵⁵⁹. Finally, Section 3 discusses the way forward, including the possibility for a new legally-binding instrument, the relevance of the Warsaw

⁵⁵⁷ J. Borger, ‘Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN’, *The Guardian online*, 17 June 2008, available at: <http://www.theguardian.com/environment/2008/jun/17/climatechange.food>.

⁵⁵⁸ United Nations Framework Convention on Climate Change (UNFCCC), adopted on 9 May 1992 in New York, entered into force on 21 March 1994, 1771 UNTS 107.

⁵⁵⁹ UNFCCC, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Decision 1/CP.16, adopted at the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, paragraph 14(f).

Loss and Damage Mechanism, and proposals for an additional UNFCCC protocol addressing climate change-induced migration.

1. HUMAN MOBILITY INCORPORATED IN THE INTERNATIONAL CLIMATE CHANGE FRAMEWORK

1.1. The development of an international climate change framework

1.1.1. A brief history of the UNFCCC and its negotiation process

1.1.1.1. An international climate regime

In the 1960s and 1970s, the first urgent alarms on climate change came from climatologists, which had observed an increase of global temperatures, and a correlated rise in the concentration of greenhouse gases in the earth's atmosphere. Scientific uncertainty on global warming led in 1988 to the creation of the Intergovernmental Panel on Climate Change (IPCC) by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). It had to provide the world with a clear scientific view on the current state of knowledge on climate change and its potential environmental and socio-economic impacts. The IPCC is now the leading international scientific body for the assessment of climate change, and compiles the views of thousands of scientists. It reviews worldwide research and issues regular assessment reports and technical papers. As they reflect a worldwide scientific consensus, the IPCC reports play a major role in the international negotiation process on climate change.

The First Assessment Report of the IPCC, released in 1990, made it clear that climate change was happening, and that international cooperation was needed to react on it. Although it was only in its Fourth Assessment Report in 2007 that the IPCC confirmed that climate change is human-made, describing how our climate is changing due to rising concentrations of greenhouse gases in the

atmosphere, the international community realised already in the late 1980's that action was needed to prevent climate change from causing costly damage and disrupting the functioning of our natural environment.

The international response to climate change began with the negotiations on an international climate treaty, in response to numerous calls for measures to reduce the emission of CO² and other greenhouse gases. The elements of such a convention had already been discussed by an international meeting of legal and policy experts, hosted by the Canadian government in Ottawa in February 1989. A soft-law statement was issued, taking the form of a draft convention on the protection of the climate and the global atmosphere⁵⁶⁰.

In 1990, the IPCC's Working Group III issued a report considering elements for inclusion in a framework convention on climate change⁵⁶¹. Later that year, in December, an Intergovernmental Negotiating Committee was set up by the UN General Assembly, with the aim of preparing a framework convention on climate change⁵⁶². The General Assembly resolution urged governments to agree on "appropriate commitments for action to combat climate change and its adverse effects"⁵⁶³, taking into account state proposals and the outcome of the IPCC's work⁵⁶⁴. The General Assembly also set out a timetable for the negotiation sessions, and laid out some organizational arrangements.

The complexity and importance of the issues involved, together with the remaining scientific uncertainty on the severity and the timescale of climate change effects, rendered the task to reach an international agreement on measures to combat climate change not easy. Due to the global character of climate change, affecting important economic sectors, the negotiations were complex. As states tried to negotiate the Convention by consensus, the negotiations only led to a compromise text, reflecting widely differing opinions among the negotiators. In particular the allocation of

⁵⁶⁰ Statement of the Meeting of legal and Policy Experts on Protection of the Atmosphere, 20-22 February 1989, Ottawa, Reprinted in 'Selected International Legal Materials on Global Warming and Climate Change', 5 *American University Journal of International Law and Policy* 2, 1990, p. 529-543; D. Zaelke and J. Cameron, 'Global Warming and Climate Change – an Overview of the International Legal Process', 5 *American University Journal of International Law and Policy* 2, 1990, p. 277; P.-M. Dupuy, 'Soft Law and the International Law of the Environment', 12 *Michigan Journal of International Law* 2, 1991, p. 427; P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 523.

⁵⁶¹ Intergovernmental Panel on Climate Change (IPCC), First Assessment Report, Report prepared by Working Group III on 'Climate Change, the IPCC Response Strategies', Chapter 11: Legal and Institutional Mechanisms, Coordinated by R. Rochon, D. Attard and R. Beetham, 1990; P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 523.

⁵⁶² United Nations General Assembly, Resolution 45/212 on 'Protection of Global Climate for Present and Future Generations of Mankind, adopted at its 71st Plenary Meeting on 21 December 1990.

⁵⁶³ United Nations General Assembly, Resolution 45/212 on 'Protection of Global Climate for Present and Future Generations of Mankind, adopted at its 71st Plenary Meeting on 21 December 1990, preamble.

⁵⁶⁴ United Nations General Assembly, Resolution 45/212 on 'Protection of Global Climate for Present and Future Generations of Mankind, adopted at its 71st Plenary Meeting on 21 December 1990, §1.

responsibility for global warming led to heated discussions between developed and developing countries. But even among developing countries, disagreements existed on the form and content of an agreement. For example the Association of Small Island States, whose population might need to be relocated if the islands would disappear, favoured a strong convention, in contrast to larger developing countries such as India and Brazil⁵⁶⁵.

In the run-up to the 1992 UN Conference on Environment and Development (UNCED), or Earth Summit, in Rio de Janeiro, the UNFCCC was finally ready for signature⁵⁶⁶. It was adopted together with the Rio Declaration on Environment and Development⁵⁶⁷, Agenda 21⁵⁶⁸, and the UN Convention on Biological Diversity⁵⁶⁹. The UNFCCC entered into force on 21 March 1994. Today, it enjoys a nearly world-wide participation, with 195 Parties having ratified the Convention.

The UNFCCC provides the international community with a global framework to tackle climate change, aimed at stabilizing the concentration of greenhouse gases in the earth's atmosphere. The ultimate goal of the Convention is to prevent dangerous human interference with the climate system⁵⁷⁰. It provides us with specific objectives and principles to guide the implementation of the Convention⁵⁷¹, and it designed a number of monitoring and reporting mechanisms to keep track of greenhouse gas emissions⁵⁷². As it is clear that industrialised countries are more responsible for the current level of greenhouse gases in the atmosphere, the UNFCCC assigns "common but differentiated responsibilities" to developed and developing states⁵⁷³. Developed countries and some so-called "economies in transition" of Eastern Europe are called "Annex I countries", and are expected to contribute the most to tackle the climate change problem. The UNFCCC also provides for solidarity mechanisms for developing countries, such as financial support and technology transfer⁵⁷⁴. Finally, it establishes the Conference of the Parties (COP) as its supreme body⁵⁷⁵. The COP meets every year, to

⁵⁶⁵ P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 523-524.

⁵⁶⁶ United Nations Framework Convention on Climate Change (UNFCCC), adopted on 9 May 1992 in New York, entered into force on 21 March 1994, 1771 *UNTS* 107 (hereafter: UNFCCC).

⁵⁶⁷ Rio Declaration on Environment and Development, adopted at the UN Conference on Environment and Development (Earth Summit) in Rio de Janeiro, 3-14 June 1992, A/Conf.151/26 (Vol.I), 12 August 1992 (hereinafter: Rio Declaration).

⁵⁶⁸ Agenda 21: Earth Summit – 'The United Nations Programme of Action for Rio', adopted at the UN Conference on Environment and Development (Earth Summit) in Rio de Janeiro, 3-14 June 1992.

⁵⁶⁹ The Convention on Biological Diversity (CBD), adopted on 5 June 1992 in Rio de Janeiro, entered into force on 29 December 1993, 1760 *UNTS* 79 (hereafter: Biodiversity Convention).

⁵⁷⁰ Article 2 of the UNFCCC.

⁵⁷¹ Article 3 of the UNFCCC.

⁵⁷² Article 12-14 of the UNFCCC.

⁵⁷³ Article 3, §1 and Article 4 of the UNFCCC.

⁵⁷⁴ Article 4, §3-10 of the UNFCCC.

⁵⁷⁵ Article 7 of the UNFCCC.

review progress under the Convention, and discuss further measures for its effective implementation.

The adoption of the UNFCCC only marked the first step in the fight against climate change. Although Article 4(2)(a) and (b) refers to the “aim” of reducing emissions to the level of 1990, it did not create a strong and clear commitment for the Parties to the Convention⁵⁷⁶. However, the UNFCCC is a framework convention, establishing a process to reach further agreement on more specific measures to combat climate change. In 1997, at COP 3, the international community took further steps and agreed upon a new protocol to the UNFCCC in the Japanese town of Kyoto⁵⁷⁷. This Kyoto Protocol commits Annex I parties to achieve clear and binding emission reduction targets, namely to reduce their overall emissions of six greenhouse gases by an average of 5.2% below the 1990 levels during a first commitment period of 2008-2012⁵⁷⁸. Furthermore, the Protocol contains provisions on land use and forestry activities (which can be offset against emission reductions), and on three flexible mechanisms: Joint Implementation, Emissions Trading and the Clean Development Mechanism⁵⁷⁹. Due to a complex ratification process, the Protocol did not enter into force until 16 February 2005. However, not all Parties to the UNFCCC are also Parties to the Protocol, which has now 192 Parties⁵⁸⁰. The United States of America (USA) for example has showed no intent to ratify the Protocol, despite their relatively high contribution to global CO₂ emissions⁵⁸¹.

The main body of the Kyoto Protocol is the Conference of the Parties (COP) to the UNFCCC, which also serves as the Meeting of the Parties to the Kyoto Protocol, and is referred to as COP/MOP⁵⁸². To improve the coordination between the UNFCCC and its Kyoto Protocol, the COP/MOP meets annually during the same period as the COP. Its first session was held in December 2005 in Montreal, together with the eleventh session of the COP.

⁵⁷⁶ P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 526.

⁵⁷⁷ Kyoto Protocol of 11 December 1997 to the United Nations Framework Convention on Climate Change, entered into force on 16 February 2005, 2303 UNTS 148 (hereafter: Kyoto Protocol).

⁵⁷⁸ Article 3 of the Kyoto Protocol; Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 1.

⁵⁷⁹ P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 526-529.

⁵⁸⁰ In accordance with Article 27(1) of the Kyoto Protocol, Canada has decided to withdraw from the Protocol on 15 December 2011. This decision took effect on 15 December 2012.

⁵⁸¹ United Nations Development Programme (UNDP), *Human Development Report 2007/2008: 'Fighting Climate Change: Human Solidarity in a Divided World'*, Palgrave Macmillan, New York, 2007, available at: http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf, p. 40-41.

⁵⁸² Article 13 of the Kyoto Protocol.

Although the Kyoto Protocol is generally referred to as a crucial step towards a world-wide system to limit average global temperature increases, it has some important limitations. The emission reduction regime proved to be ineffective and inadequately implemented. Furthermore, the binding targets only apply to the first commitment period, which ended in 2012⁵⁸³. By this time, a new international framework needed to be put in place, in order to commit the international community to reduce its greenhouse gas emissions to the level indicated by the IPCC reports.

1.1.1.2. Two negotiation “tracks”

At their first meeting in Montreal in 2005, the Parties to the Kyoto Protocol launched the negotiations on the next phase of the Protocol, by establishing the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP)⁵⁸⁴. As required by Article 3(9) of the Protocol, the AWG-KP needs to negotiate on further commitments for Annex I Parties after the end of the first commitment period in 2012⁵⁸⁵. At the same COP, delegates also agreed to consider long-term cooperation under the UNFCCC through a series of four workshops known as ‘the Convention Dialogue’⁵⁸⁶.

With the release of the IPCC’s Fourth Assessment Report two years later, the climate negotiations came under growing media attention. In December 2007, negotiations at the COP13 in Bali, Indonesia resulted in the adoption of the Bali Road Map, which launched a two-year process to reach

⁵⁸³ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 804.

⁵⁸⁴ UNFCCC, ‘Consideration of Commitments for Subsequent Periods for Parties included in Annex I to the Convention under Article 3, Para. 9 of the Kyoto Protocol’, Decision 1/CMP.1, adopted at the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005, FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, paragraph 2.

⁵⁸⁵ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 499; UNFCCC, Decision 1/CMP.1 on the ‘Consideration of Commitments for Subsequent Periods for Parties included in Annex I to the Convention under Article 3, Para. 9 of the Kyoto Protocol’, adopted at the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005, FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, paragraph 3.

⁵⁸⁶ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2.

an ‘agreed outcome’ on long-term cooperative action on climate change⁵⁸⁷. This road map included the Bali Action Plan⁵⁸⁸, in which the negotiating Parties decided

“to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session”⁵⁸⁹.

To conduct this process, delegates established the Ad Hoc Working Group on Long-term Cooperative Action under the UN Framework Convention on Climate Change (AWG-LCA)⁵⁹⁰. This AWG-LCA received the mandate to focus on the key elements of long-term cooperation that were identified during the Convention Dialogue, namely shared vision, mitigation, adaptation, technology development and transfer, and finance⁵⁹¹.

The establishment of the AWG-LCA resulted in a negotiation process with two ‘tracks’, under the Kyoto Protocol and the Convention itself, launched in 2005 and 2007 respectively. The end of this two-year process was scheduled in December 2009, when COP15 and COP/MOP5 were planned to take place in Copenhagen. During the course of 2008 and 2009, the two AWGs met many times during various negotiation sessions in preparation of the COPs. The first half of 2009, the AWG-LCA developed a draft negotiation text of nearly 200 pages, covering the main elements of the Bali Road Map. As for the AWG-KP, the focus lied on the aggregate and individual emission reductions of Annex I Parties beyond 2012. Although some progress was made on adaptation, technology and capacity building, there were still huge disagreements on mitigation and certain aspects of funding when Parties headed into the Copenhagen summit⁵⁹². Mainly due to diverging views between developed and developing countries, insufficient progress was made, and delegates at COP15 did not succeed to arrive at an ‘agreed outcome’ as was expected by the Bali Road Map (*see further under Section 1.2.3.*).

⁵⁸⁷ UNFCCC, Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, Decision 1-14/CP.13, FCCC/CP/2007/6/Add.1, 14 March 2008, (hereafter: Bali Road Map).

⁵⁸⁸ UNFCCC, Bali Action Plan, Decision 1/CP.13, adopted at the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, FCCC/CP/2007/6/Add.1, 14 March 2008 (hereafter: Bali Action Plan).

⁵⁸⁹ Paragraph 1 of the Bali Action Plan.

⁵⁹⁰ Paragraph 2 of the Bali Action Plan.

⁵⁹¹ Bali Action Plan; L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 499-500; Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2.

⁵⁹² Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2.

In Copenhagen, the mandates of the AWG-LCA and AWG-KP were prolonged, in other to continue negotiations towards COP16 in Cancun (*see further under Sections 1.2.3. and 2.1.1.*). However, as the outcome of the Cancun summit was unsatisfactory in the search for an ‘agreed outcome’, the climate negotiations were taken even further towards COP17 in Durban and COP18 in Doha (*see further under Section 3*).

1.1.2. Introduction of adaptation measures in the UNFCCC framework

In the early days of climate negotiations, the focus lay mostly on efforts to reduce the level of greenhouse gases in the atmosphere, so as to prevent dangerous human interference with the climate system. However, in the light of growing scientific information, in the 1990s it became clear that even without further greenhouse gas emissions, their concentration in the atmosphere would continue to rise for at least two centuries more⁵⁹³. As the world continues to become warmer, at a pace unprecedented in recent human history, the adverse effects of climate change on human beings will increase. More and more regions will become uninhabitable in the future. The least developed countries are most vulnerable to the impacts of global warming, as highlighted by the IPCC in its Fourth Assessment Report⁵⁹⁴. They will suffer the most from devastating effects of global warming, such as the increase of extreme weather events, sea level rise and desertification.

At the time of the adoption of the UNFCCC in 1992, adaptation measures did not receive much attention. The Convention only included some hazy references to adaptation⁵⁹⁵. Furthermore, the UNFCCC was criticised for not acknowledging the responsibility of industrialised countries to compensate developing countries for the harm caused by their greenhouse gas emissions. The text only contained a vague commitment for developing countries to assist vulnerable developing countries in meeting the costs of adaptation to the adverse effects of climate change⁵⁹⁶. Fortunately, much has changed since then. The international community started to realise that it could not prevent all adverse effects from climate change from happening. In order to reduce the impacts of

⁵⁹³ P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 526.

⁵⁹⁴ Intergovernmental Panel on Climate Change (IPCC), Fourth Assessment Report, ‘Climate Change 2007’, The Synthesis Report: Summary for Policymakers, 2007.

⁵⁹⁵ See for example Article 3(3) and Article 4(1)(b) and (e) of the UNFCCC.

⁵⁹⁶ Article 4(4) of the UNFCCC; P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 531.

global warming, and to increase our resilience to future climate change impacts, adaptation became crucial.

Following new scientific evidence on the impacts of and vulnerabilities to climate change, Parties to the UNFCCC recognised the need to support adaptation measures in developing countries. The publication of the IPCC's 4th Assessment Report in 2007 removed the emphasis from mitigation to adaptation. At COP 13 in Bali in 2007, Parties identified adaptation as one of the five building blocks of a future climate deal, together with a shared vision, mitigation, finance and technology⁵⁹⁷. The Bali Action Plan identified adaptation as vital for a strengthened response to climate change, and described the elements of adaptation to be considered in an international climate agreement⁵⁹⁸.

More recently, the Copenhagen Accord, adopted at COP15 in December 2009, reiterated the importance of adaptation measures as follows:

“Adaptation to the adverse effects of climate change and the potential impacts of response measures is a challenge faced by all countries. Enhanced action and international cooperation on adaptation is urgently required to ensure the implementation of the Convention by enabling and supporting the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing countries, especially in those that are particularly vulnerable, especially least developed countries, small island developing States and Africa. We agree that developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation action in developing countries”⁵⁹⁹.

Today, different Convention bodies address adaptation issues. Funding for adaptation is provided by various financial mechanisms, operated by the Global Environment Facility (GEF) and the Adaptation Fund Board (AFB) (*see further under Section 2.4.2*). The Adaptation Fund for example is meant to finance adaptation projects and programmes in developing states that are Parties to the Kyoto Protocol. More recently, the Adaptation Committee was set up under the Cancun Adaptation

⁵⁹⁷ Bali Action Plan; K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 4.

⁵⁹⁸ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 4.

⁵⁹⁹ UNFCCC, Copenhagen Accord of 18 December 2009, Decision 2/CP.15, adopted at the Conference of the Parties on its Fifteenth Session, held in Copenhagen from 7 to 19 December 2009, FCCC/CP/2009/11/Add.1, 30 March 2010 (hereafter: Copenhagen Accord), Paragraph 3.

Framework to promote the implementation of enhanced action on adaptation under the UNFCCC in a coherent manner.

Mitigation and adaptation are now equal and complementary pillars in the UNFCCC negotiation process. Since the inclusion of the adaptation pillar in the climate negotiations, a wide range of measures to reduce communities' vulnerabilities to climate change and increase their resilience to its adverse effects have been defined. Adaptation strategies and measures are implemented at the international, national and community level. Where people are able to adapt, they might be able to remain in their environment. Where adaptation fails, people might be forced to leave their traditional habitat. However, as discussed in PART I of this research, there is now a growing recognition that migration itself might be one of the possible strategies to adapt to a changing environment. Adaptation thus involves both measures to reduce a population's vulnerability, so as to prevent them from having to migrate, and migration itself as an adaptation strategy that allows people to reduce their vulnerability⁶⁰⁰. The next Section will discuss how climate-induced migration has entered the international climate change adaptation framework.

1.2. Human mobility and the climate negotiations

Although neither the UNFCCC, nor its Kyoto Protocol explicitly addresses climate-induced migration and displacement, the international climate regime implicitly has an important role to play with regard to climate-related movement. The UNFCCC and related instruments are a branch of international environmental law seeking to protect the natural environment⁶⁰¹, which may be affected by human activities. Considering the dependence of human beings on the environment, the protection of the natural environment contributes to the protection of their livelihoods. Through mitigation of and adaptation to the adverse effects of global warming, international climate law is therefore highly relevant with regard to the *prevention* of climate migration.

However, to the extent to which the climate regime cannot limit or prevent climate change-induced migration, it becomes interesting to discuss how human mobility could be brought under the umbrella of the UNFCCC. Section 1.2.1. therefore outlines which "hooks" the international climate

⁶⁰⁰ S. Martin, 'Climate Change, Migration and Governance', 16 *Global Governance on Migration* 3, July-September 2010, p. 398-399.

⁶⁰¹ Article 2 of the UNFCCC (Objective).

regime offers to address climate-induced human mobility. Section 1.2.2. then discusses the emergence of the issue in the international climate negotiations, before Section 1.2.3. describes the genesis of the new migration reference within the climate change regime.

1.2.1. Legal grounds to bring migration into the UNFCCC regime

As mentioned above, the primary goal of the UNFCCC is to prevent dangerous anthropogenic interference with the climate system. According to Article 1 of the Convention, the definition of ‘adverse effects of climate change’ includes

“changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or *on human health and welfare*” [emphasis added]⁶⁰².

As climate-induced migration, and in particular forced movement, could be interpreted as amounting to deleterious effects on human health or welfare, climate-related human mobility could be brought within the scope of the UNFCCC.

In the preamble to the Convention, Parties further acknowledged

“that change in the Earth’s climate and its adverse effects are a common concern of humankind”⁶⁰³

and recognised

“that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change”⁶⁰⁴.

Parties therefore agreed to give full consideration to

“the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change”⁶⁰⁵.

⁶⁰² Article 1(1) of the UNFCCC (Definitions).

⁶⁰³ Preamble of the UNFCCC, para. 1.

⁶⁰⁴ Preamble of the UNFCCC, para. 19.

⁶⁰⁵ Article 3(2) of the UNFCCC (Principles).

Countries which are mentioned here as “particularly vulnerable to the adverse effects of climate change”, are in fact those countries which are vulnerable to climate-induced migration and displacement, caused by sea level rise, desertification and sudden-onset natural hazards. If we interpret ‘adverse effects’ as including climate-related migration and displacement, this principle of Article 3(2) also brings human mobility into the sphere of the UNFCCC.

Moreover, in Article 4(8) the Convention obliges developed countries to

“give full consideration to what actions are necessary under the Convention ... to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation or response measures, especially on (a) Small island countries; (b) Countries with low-lying coastal areas; (c) Countries with arid and semi-arid areas, ... (d), Countries with areas prone to natural disasters; (e) Countries with areas liable to drought and desertification,...”⁶⁰⁶

Parties shall furthermore

“assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects”⁶⁰⁷.

At the time of the adoption of these provisions, migration was not yet accepted a part of adaptation action. However, with the adoption of the Cancun Adaptation Framework, human mobility is now incorporated into a list of possible adaptation measures (*see further in Section 2*). The question thus rises whether Article 4(4) also refers to the costs of climate-related migration and displacement.

Although the UNFCCC does not explicitly refer to climate change-induced human mobility, it does offer some indirect “hooks” to bring migration and displacement within the scope of the international climate change regime. However, it is important to keep the limits of what can be later achieved with a COP decision in mind. COP decisions can only elaborate existing treaty obligations. They cannot create substantive new obligations, and they are often not legally binding (*see further in Section 2.3*).

Despite the fact that migration and displacement were not addressed at the time of the adoption of the UNFCCC in 1992, the issue has appeared on the negotiation agenda in the process towards a post-2012 climate regime. The next Sections will outline the development of a reference to climate change-induced movement within the framework of the UNFCCC.

⁶⁰⁶ Article 4(8) of the UNFCCC (Commitments).

⁶⁰⁷ Article 4(4) of the UNFCCC (Commitments).

1.2.2. How human mobility entered the climate negotiations

Ever since the IPCC highlighted migration and displacement as consequences of global warming in 1990⁶⁰⁸, humanitarian agencies have been advocating for the legal recognition of human mobility as a result of climate change impacts. For years, international governmental and non-governmental organisations, such as the IOM, the UN High Commissioner for Refugees (UNHCR) and the Norwegian Refugee Council (NRC) have been lobbying, together with academics and some developing countries, for the mere mentioning of migration within the international climate change framework. With a reference to migration in the negotiation texts, they wanted to bring the existence of people displaced or migrating due to climate change to the forefront⁶⁰⁹.

According to the IOM, migration needs to be fully mainstreamed into the climate change adaptation framework⁶¹⁰. Together with other international organisations, it has submitted various reports to the UNFCCC, specifically addressing migration and displacement⁶¹¹. Climate-induced migration also came up in several side-events and figured in some of the statements of national ministers during successive climate negotiations. However, it had never made it into the formal negotiation process. Most policymakers still viewed climate-induced migration as a failure of adaptation to the adverse effects of climate change, and did not find it necessary to address it as an adaptation strategy on its own.

From 2007 onwards, the academic and humanitarian community both engaged in the effort to put the human face of climate change on the agenda. The academic community contributed a lot in bringing climate-induced migration to the UNFCCC negotiation table, as research findings filled knowledge gaps for policymakers⁶¹². Field observations led to increasingly detailed information on

⁶⁰⁸ Intergovernmental Panel on Climate Change (IPCC), First Assessment Report, Working Group II: 'Impacts Assessment of Climate Change', 1990.

⁶⁰⁹ C. Lawton, 'What about Climate Refugees? Efforts to Help the Displaced Bog Down in Copenhagen', Spiegel online, 17 December 2009; V. Kolmannskog, 'Towards a Humanitarian Climate Change Agreement', in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf, p. 22-23.

⁶¹⁰ International Organisation for Migration (IOM), 'Disaster risk reduction, climate change adaptation and environmental migration: A Policy Perspective', Geneva, 2010, available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/DRR-CCA-Policy-Paper-Final.pdf.

⁶¹¹ V. Kolmannskog, 'Towards a Humanitarian Climate Change Agreement', in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf, p. 22-23.

⁶¹² K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement,

current and future mobility caused by environmental degradation. The European Commission for example financed the Environmental Change and Forced Migration Scenarios Project (EACH-FOR), with the aim to collect data on and describe causes of environment-induced migration. The 23 case studies carried out by researchers associated with the EACH-FOR project provided policymakers with plausible future scenarios of environment-induced migration⁶¹³.

The operational experience of UN and other international agencies complemented these research findings, and helped policymakers to understand the urgency of the topic. The Inter-Agency Standing Committee Task Force on Climate Change (IASC) dedicated a sub-group on migration and displacement, which coordinated side events, policy briefings and bilateral meetings with Parties to the UNFCCC⁶¹⁴.

In 2007-2008, the emerging knowledge base on environment-induced migration and displacement led to the first international conferences on this topic⁶¹⁵. Researchers and policymakers were brought together in the Climate Change, Environment, and Migration Alliance (CCEMA)⁶¹⁶, with the aim of providing an informal network for a global multi-stakeholder partnership between the environmental, humanitarian, development and migration community.

convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 6.

⁶¹³ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 6.; K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 19-21.

⁶¹⁴ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 7-8; K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 21-22.

⁶¹⁵ For example the International Conference on 'environment, Forced Migration and Social Vulnerability (EFMSV)', organised by UNU-EHS, 9-11 October 2008, Bonn, Germany; Research Workshop 'Migration and the Environment: Developing a Global Research Agenda', hosted by the IOM, Munich Re-Foundation, UNEP, and UNU-EHS, Munich, 16-18 April 2008 (with support from the Rockefeller Foundation).

⁶¹⁶ www.ccema-portal.org.

In the months leading to the COP 14 in Poznan, the UNFCCC accepted submissions from both Parties and observers to the UNFCCC process. Both research and operational organisations, within the UN system as well as other international agencies, could thus present their views and try to influence the negotiation process directly⁶¹⁷. In August 2008, research findings on environment-induced migration were presented in the first submissions on the issue to the AWG-LCA, by the IASC, the United Nations University's Institute for Environment and Human Security (UNU-EHS), the IOM, UNEP, the Munich Re Foundation, and UNHCR⁶¹⁸. Those submissions encouraged policymakers to introduce the topic into the early informal discussions of the AWG-LCA on the elements of a broad adaptation framework. At subsequent negotiation sessions in 2008, the UNU-EHS, UNHCR, the IOM and other international organisations were consistently present to keep the topic under the attention of the negotiating parties, and to persuade them that the issue of climate change-induced migration and displacement was relevant to their policy concerns.

The role of both the academic world and operational organisations should not be underestimated in building the case of a reference to migration in the UNFCCC framework. Through research findings and intensive advocacy work, the issue of climate-induced migration gradually entered the formal climate change negotiation process. In December 2008, the issue of climate-induced mobility was for the first time mentioned in a UNFCCC assembly text (*see further in Section 1.2.3*). From then onwards, new developments in research helped to keep the topic on the agenda. International conferences and government-funded workshops and research projects, such as the UK Foresight project, together with a roundtable on the issue at the Global Forum on Migration and Development in Mexico in November 2010, showed that climate-induced human mobility was gaining international policymakers' attention. Furthermore, the IPCC announced to give the issue a higher profile in its

⁶¹⁷ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 7.

⁶¹⁸ Interagency Standing Committee (IASC), 'Climate Change, Migration and Displacement: Who will be Affected?', Working paper submitted by the Informal Group on Migration/Displacement and Climate Change of the IASC, Geneva/New York, 31 October 2008, available at: <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>; K. Warner, Workshop Report on the 'Research Workshop on Migration and the Environment: Developing a Global Research Agenda', organized by UNU-EHS, IOM, UNEP and the Munich Re Foundation from 16-19 April 2008 in Munich, Germany, available at: <http://www.ccema-portal.org/File/Get/5774>; United Nations High Commissioner for Refugees (UNHCR), 'Forced Displacement in the Context of Climate Change: Challenges for States under International Law', Paper submitted in cooperation with the Norwegian Refugee Council, the Representative of the Secretary General on the Human Rights of Internally Displaced Persons and the United Nations University to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June in Bonn, Germany, 19 May 2009, available at: <http://unfccc.int/resource/docs/2009/smsn/igo/049.pdf>.

Fifth Assessment Report, which was released in 2014⁶¹⁹. These developments supported the view that the issue was important enough to be addressed in the climate negotiations⁶²⁰.

While climate-induced mobility had entered the negotiation process through intensive advocacy work by the humanitarian and academic community, party positions on the issue were much less pronounced. Koko Warner, being directly involved in the negotiation process as head of the Environmental Migration, Social Vulnerability & Adaptation Section of UNU-EHS, reviewed the position of the various negotiating blocks on the introduction of migration in the climate change regime, and pointed out the non-controversial position on the introduction of the issue during the negotiations⁶²¹.

However, while the G77 and China supported a new paragraph on climate-induced mobility, the views within this group widely diverged. The BASIC countries, with the emerging economies Brazil, South Africa, India and China, focused their attention on the more political discussions, such as the division between developed and developing countries. Although they did not object to a reference to migration, they preferred to define adaptation solutions, including for example population relocation due to mitigation projects, at the national level, without international interference⁶²². On the other hand, the Alliance of Small Island States (AOSIS) has positioned itself stronger in the debate on the migration and climate change nexus. While some of them have presented themselves as 'sinking island states', trying to draw attention to their need for international migration and relocation measures, others did not agree with this discourse. Arguing for population relocation would,

⁶¹⁹ See Chapter 12 in the Intergovernmental Panel on Climate Change (IPCC), Chapter Outline of the Working Group II Contribution to the Fifth Assessment Report on 'Climate Change 2014: Impacts, Adaptation, and Vulnerability', adopted at the Thirty-first Session of the IPCC in Bali, 26-29 October 2009, available at: http://www.ipcc-wg2.gov/AR5/AR5_documents/doc20-rev1.pdf. On 31 March 2014, the Final Draft Report was released: Intergovernmental Panel on Climate Change (IPCC), 'Fifth Assessment Report: Contribution of Working Group II to the IPCC's 5th Assessment Report, *Climate Change 2014: Impacts, Adaptation, and Vulnerability*', available at: <http://ipcc-wg2.gov/AR5/report/final-drafts/>. See Chapter 12.4. on 'Migration and Mobility Dimensions of Human Security', p. 11-15.

⁶²⁰ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 20.

⁶²¹ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 17.

⁶²² K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 17.

according to them, equate with admitting that limiting global warming to 1.5°C is no longer attainable. Finally, the Least Developed Countries (LDCs) were, due to lower negotiation capacity, less involved in the discussions on climate-induced migration (except from Bangladesh, which has helped to bring the issue on the negotiation table)⁶²³.

Most industrialised countries, wishing to escape from any liability claims, were more open to proposals entailing knowledge building and research measures than to issues such as compensation and insurance mechanisms. Therefore, their position on climate-induced mobility is focused on information gathering, dialogue and coordination, instead of creating new mechanisms addressing climate migration and displacement. Within this group, European states have been more receptive to the topic, with particularly Norway, Germany and the UK supporting knowledge building and international dialogue. However, European countries also agreed that existing mechanisms and frameworks, such as humanitarian assistance and current migration legislation, are sufficient to manage climate-related migration and displacement⁶²⁴.

This non-controversial position on the introduction of climate migration in the international climate negotiations is remarkable, as migration and displacement are generally considered as “difficult” topics to find agreement on at the international level. However, these party views reflect the treatment of human mobility as a purely technical issue within a much larger adaptation package. In the UNFCCC negotiation process, the discussions are dominated by politically more difficult topics, such as mitigation targets and climate finance, which left the road open to the introduction of migration and displacement at a more technical level in the negotiations⁶²⁵. UNFCCC delegates negotiating on this issue furthermore tend to be affiliated to environmental ministries, instead of home affairs departments, which makes them frame the issue in a different way than in other

⁶²³ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 17-18.

⁶²⁴ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 19.

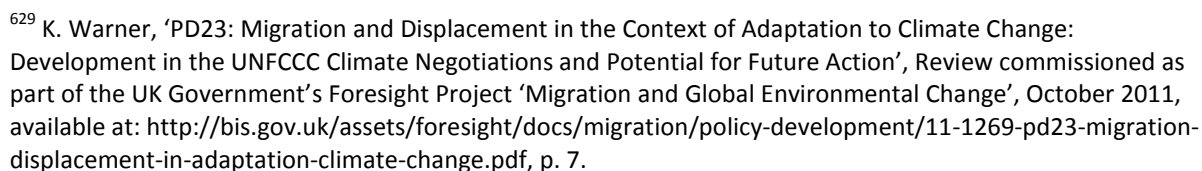
⁶²⁵ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 17.

political forums⁶²⁶. So ironically, Parties could find agreement on the inclusion of migration in the negotiation text, because it was, unlike in other international forums, not couched in bigger political issues, such as security and national borders⁶²⁷. According to Warner, this provides “a unique channel for new thinking and action on the topic area”⁶²⁸.

⁶²⁶ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 14.

⁶²⁷ K. Warner, ‘Migration as Adaptation in the UNFCCC Climate Negotiations’, Presentation at the Conference on ‘Climate Change and Migration in the Asia-Pacific: Legal and Policy Responses’, Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW, NSW Parliament House, Sydney, Australia, 10-11 November 2011, available at: <https://tv.unsw.edu.au/Video/Climate-Change-and-Migration-Session-4>.

⁶²⁸ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 14.



1.2.3. *The development of a migration reference in the negotiation text*

1.2.3.1. From “climate refugees” to a more nuanced view of environment-induced mobility

At COP 14 in Poznan, AWG-LCA Chair Michael Ammit Cutajar presented an assembly text from all the submissions after COP 13 in December 2007⁶³⁰. This document referred, for the first time, to climate-induced “migration” and to “climate refugees”⁶³¹. Based on a submission of the UNU, the chapter on adaptation action referred to regional migration observations and assessments of migratory flows⁶³². According to the IASC, climate-induced migration needed to be taken into account in adaptation planning and implementation⁶³³. Furthermore, the UNU had pointed out that public awareness raising is crucial for enhanced knowledge sharing⁶³⁴. And even in the chapter on mitigation action, the ILO proposed to measure social and environmental impacts on local communities with respect to migration⁶³⁵. Finally, there was one submission of a State Party that touched upon human mobility.

⁶³⁰ UNFCCC, ‘Ideas and Proposals on Paragraph 1 of the Bali Action Plan’, Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009.

⁶³¹ UNFCCC, ‘Ideas and Proposals on Paragraph 1 of the Bali Action Plan’, Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009, annex 16 paras 63(g) on measuring, verifying, and reporting of emissions reductions (section C, ILO submission); paras 112(f) and 112(h) (section D, UNU submission, IASC and UNU submissions); K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 8.

⁶³² UNFCCC, ‘Ideas and Proposals on Paragraph 1 of the Bali Action Plan’, Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009, § 112(f), p. 76 (UNU submission MISC. 3).

⁶³³ UNFCCC, ‘Ideas and Proposals on Paragraph 1 of the Bali Action Plan’, Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009, §112(h), p. 77 (IASC submission MISC. 6/Add. 2).

⁶³⁴ UNFCCC, ‘Ideas and Proposals on Paragraph 1 of the Bali Action Plan’, Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009, § 114(a), p. 77 (UNU submission MISC. 3).

⁶³⁵ UNFCCC, ‘Ideas and Proposals on Paragraph 1 of the Bali Action Plan’, Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009, §63(g), p. 49 (ILO submission MISC. 6/Add.2).

Bangladesh proposed to introduce solidarity funds or insurance mechanisms for the compensation of climate refugees⁶³⁶.

After COP 14, observers to the UNFCCC process were no longer allowed to submit proposals. The humanitarian community therefore had to change its strategy, and tried to keep the issue of climate migration on the agenda through its indirect influence on the Parties itself. The results of the EACH-FOR Project for example were presented to UNFCCC delegates at the June 2009 negotiation session in Bonn. Furthermore, a large amount of publications and special journal issues, together with extensive media coverage helped to keep the issue under policymakers' attention.

Even though many issues that came up in the initial assembly text disappeared in the months leading to the COP 15 in Copenhagen due to Parties' objections, the topic of climate migration remained present in the draft negotiation text⁶³⁷. In March 2009, during the first of 5 planned negotiation sessions on the road to Copenhagen, the AWG-LCA discussed a document prepared to further focus the negotiation process on the fulfilment of the Bali Action Plan⁶³⁸. This document, which took account of the submissions and proposals made before and after COP 14, did not explicitly refer to climate-induced mobility. However, in June 2009, at the 6th Session of the AWG-LCA in Bonn, a first draft negotiating text had been prepared by the Chair of the AWG-LCA, in order to facilitate the negotiations towards an agreed outcome to be adopted at COP 15⁶³⁹. This text, which only served as a starting point for the negotiations, provided a number of options on how ideas and proposals made by states could be translated into the agreed outcome. Paragraph 25(e), on the implementation of adaptation action, referred to climate mobility as follows:

⁶³⁶ UNFCCC, 'Ideas and Proposals on Paragraph 1 of the Bali Action Plan', Revised Note by the Chair, prepared for the Fourth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 1-10 December 2008 in Poznan, FCCC/AWGLCA/2008/16/Rev.1, 15 January 2009, § 187, p. 116-117 (submission from Bangladesh, FCCC/AWGLCA/2008/11).

⁶³⁷ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 8-9.

⁶³⁸ UNFCCC, 'Fulfilment of the Bali Action Plan and Components of the Agreed Outcome', Note by the Chair (Part I), prepared for the Fifth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 29 March to 8 April 2009, Bonn, Germany, FCCC/AWGLCA/2009/4 (Part I), 18 March 2009; UNFCCC, 'Fulfilment of the Bali Action Plan and Components of the Agreed Outcome', Note by the Chair (Part II), prepared for the Fifth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), from 29 March to 8 April 2009, Bonn, Germany, FCCC/AWGLCA/2009/4 (Part II), 18 March 2009.

⁶³⁹ UNFCCC, 'Negotiation Text', Note by the Chair, prepared for the Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 1-12 June 2009 in Bonn, Germany, FCCC/AWGLCA/2009/8, 19 May 2009.

“25. The adaptation [framework][programme] shall support and enhance the implementation of national adaptation plans. Adaptation action includes:

...

(e) Activities related to national and international migration/planned relocation of climate refugees”.

Remarkably, this suggested paragraph still referred to national as well as international migration. Later in the negotiation process, delegates chose to leave out an explicit reference to international migration or displacement (*see further below in Section 2*).

The UNHCR, IOM, NRC, and the UNU warmly welcomed this reference to international and national migration within the adaptation context. In their submission to the 6th session of the AWG-LCA, they pointed out that migration may be used as an adaptation mechanism. In other cases, where migration is the only left survival option, the international community will have to cooperate to ensure adequate assistance and protection to forcibly displaced persons. According to these organisations, this has to be incorporated into national adaptation policies⁶⁴⁰. However, the organisations disagreed with the terminology of the negotiation text. As the term ‘environmental’ or ‘climate refugee’ has no legal basis in international refugee law, the use of the term ‘refugee’ should be avoided⁶⁴¹. The organisations therefore proposed to replace it by more accepted terminology, such as ‘migration’ and ‘displacement’, used in international protection frameworks. They suggested the following rewording of paragraph 25(e):

⁶⁴⁰ United Nations High Commissioner for Refugees (UNHCR), Non Paper on ‘Comments and Proposed Revisions to the Negotiating Text prepared by the Chair of the UNFCCC Ad Hoc Working Group on Long-Term Cooperative Action’, prepared by the Office of the United Nations High Commissioner for Refugees, the International Organisation for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 1-12 June in Bonn, Germany, 5 June 2009, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4a408cc19&query=UNFCCC>, §2.

⁶⁴¹ United Nations High Commissioner for Refugees (UNHCR), Non Paper on ‘Comments and Proposed Revisions to the Negotiating Text prepared by the Chair of the UNFCCC Ad Hoc Working Group on Long-Term Cooperative Action’, prepared by the Office of the United Nations High Commissioner for Refugees, the International Organisation for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 1-12 June in Bonn, Germany, 5 June 2009, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4a408cc19&query=UNFCCC>, §3. For a further discussion on the terminology issue, they refer to the earlier submitted paper: Interagency Standing Committee (IASC), ‘Climate Change, Migration and Displacement: Who will be Affected?’, Working paper submitted by the Informal Group on Migration/Displacement and Climate Change of the IASC, Geneva/New York, 31 October 2008, available at: <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>.

“(e) Activities related to national and international migration and displacement or planned relocation of persons affected by climate change”⁶⁴².

Furthermore, they also suggested the addition of the following sentence, either in the same subparagraph (e) or in a new one (paragraph 25(f)):

“The same [framework] [programme] shall acknowledge the need to identify modalities of inter-State cooperation to respond to the needs of affected populations who either cross an international frontier as a result of or find themselves abroad and are unable to return due to the effects of climate change”⁶⁴³.

Again, this proposal focuses specifically on cross-border migration and displacement.

At the June 2009 meeting in Bonn, delegates received a policy summary of the findings from the field-based EACH-FOR Project. The results were also presented at a media training workshop during the Bonn session, and received large media attention⁶⁴⁴. Except from a concern on the use of the word ‘refugee’ by the US delegation during the opening plenary session in Bonn, there have been no objections from State Parties to the UNFCCC on the inclusion of human mobility in the negotiation text⁶⁴⁵. The fact that this issue entered the formal negotiation process marked a significant step

⁶⁴² United Nations High Commissioner for Refugees (UNHCR), Non Paper on ‘Comments and Proposed Revisions to the Negotiating Text prepared by the Chair of the UNFCCC Ad Hoc Working Group on Long-Term Cooperative Action’, prepared by the Office of the United Nations High Commissioner for Refugees, the International Organisation for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 1-12 June in Bonn, Germany, 5 June 2009, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4a408cc19&query=UNFCCC>, §4.

⁶⁴³ United Nations High Commissioner for Refugees (UNHCR), Non Paper on ‘Comments and Proposed Revisions to the Negotiating Text prepared by the Chair of the UNFCCC Ad Hoc Working Group on Long-Term Cooperative Action’, prepared by the Office of the United Nations High Commissioner for Refugees, the International Organisation for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 1-12 June in Bonn, Germany, 5 June 2009, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4a408cc19&query=UNFCCC>, §5.

⁶⁴⁴ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 9.

⁶⁴⁵ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 9.; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global

forwards. It showed that the need to help climate change-induced migrants and displaced persons had increasingly gained policymakers' attention⁶⁴⁶.

During the 6th AWG-LCA Session, Parties had provided general comments on the structure and content of the negotiation text. Their reservations and objections were reflected in a revised negotiation text, which also contained proposed additions and modifications⁶⁴⁷. Objections and reservations concerning certain elements of the text were reflected by square brackets. While the initial draft of May 2009 still referred to "climate refugees", the wording of the migration paragraph in the negotiation text had changed a lot since then. The concerns expressed by the US and the humanitarian community were taken into account.

In the revised negotiation text of June 2009, human mobility featured in Section B on "*Implementation [of adaptation action]*" (in *Chapter II - Enhanced action on adaptation and its means of implementation*):

"§25. [The adaptation [framework][programme] [shall] [should] support and enhance the implementation of national adaptation programmes, projects, actions and plans. [Adaptation action] [National Adaptation Plan] includes:]

(e) [Activities related to national and international migration/planned relocation of climate [refugees] [migrants] [displaced persons by extreme climate events].]".

As the whole paragraph was put between brackets, it still required further negotiations⁶⁴⁸. The revised text already provided some alternatives to paragraph 25(e), to be discussed during the next meeting of the AWG-LCA. Most of those alternative proposals focused on "national and international" migration, displacement and planned relocation. However, the first alternative referred to "[Activities related to national and international responses to people displaced by the impacts of climate change]". Remarkably, this wording did no longer make a distinction between national and international *mobility*. Instead, it distinguished between national and international *responses* to the issue of climate-induced migration.

Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 8.

⁶⁴⁶ 'Climate Change: Good News for Climate Change Migrants', *IRIN Humanitarian News and Analysis*, 11 December 2009, available at: <http://www.irinnews.org/report/87405/climate-change-good-news-for-climate-change-migrants>.

⁶⁴⁷ UNFCCC, 'Revised Negotiation Text', Note by the Secretariat, adopted during the Sixth Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 1-12 June 2009 in Bonn, Germany, FCCC/AWGLCA/2009/Inf.1, 22 June 2009.

⁶⁴⁸ V. Kolmannskog, 'Towards a Humanitarian Climate Change Agreement', in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf, p. 22.

At an informal meeting of the AWG-LCA in Bonn on 10-14 August 2009, the revised negotiating text was discussed by informal groups and sub-groups, with a view to modifying the text in the direction of consolidation. Based on discussions between Parties, facilitators worked on a document containing suggestions for reordering and consolidating elements of the negotiation text⁶⁴⁹. Climate-induced migration featured in this text under a paragraph establishing an Adaptation Fund, to be based on contributions from developed countries. This Fund would provide sufficient financial resources to support, *inter alia*, “activities related to national and international migration and displacement or planned relocation of persons affected by climate change”⁶⁵⁰.

At the 7th Session of the AWG-LCA in Bangkok in September 2009 and Barcelona in November 2009, the emergence of human mobility in the negotiation text even received explicit support from the G77 and China⁶⁵¹. During these meetings, the texts dealing with adaptation measures dropped the term ‘refugee’, and used the words ‘migration’, ‘displacement’ and ‘planned relocation’ instead. According to Warner, this change of terminology “reflected the understanding that human mobility occurs on an adaptation continuum”⁶⁵². The report of the Bangkok and Barcelona meetings contained the latest non-papers produced by chairs, co-chairs and facilitators of the AWG-LCA groups as an annex, in order to facilitate negotiations to reach an agreed outcome at the AWG-LCA’s 8th Session in Copenhagen⁶⁵³. In a Non-Paper from November 2009, the revised negotiation text contained the following wording on human mobility in paragraph 13(b):

“13. All Parties [shall] [should] jointly undertake action under the Convention to enhance adaptation at the international level, including through:

⁶⁴⁹ UNFCCC, ‘Reordering and Consolidation of Text in the Revised Negotiating Text’, Note by the Secretariat, prepared for the Seventh Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 28 September to 9 October 2009 in Bangkok, Thailand and from 2-6 November 2009 in Barcelona, Spain, FCCC/AWGLCA/2009/INF.2, 15 September 2009.

⁶⁵⁰ UNFCCC, ‘Reordering and Consolidation of Text in the Revised Negotiating Text’, Note by the Secretariat, prepared for the Seventh Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 28 September to 9 October 2009 in Bangkok, Thailand and from 2-6 November 2009 in Barcelona, Spain, FCCC/AWGLCA/2009/INF.2, 15 September 2009, §35(q), p. 41.

⁶⁵¹ V. Kolmannskog, ‘Towards a Humanitarian Climate Change Agreement’, in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf, p. 23.

⁶⁵² K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 7.

⁶⁵³ UNFCCC, Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) on its Seventh Session, held in Bangkok from 28 September to 9 October 2009, and Barcelona from 2 to 6 November 2009, FCCC/AWGLCA/2009/14, 20 November 2009.

(b) Activities related to migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to identify modalities of interstate cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change”⁶⁵⁴.

The brackets had been removed from the mobility paragraph, which meant there was a large consensus on the inclusion of the issue in the text.

In line with the first alternative of the negotiation text of June 2009, this paragraph does no longer explicitly distinguish between national and international migration. However, the text does explicitly mention people migrating across international borders, or people unable to return due to climate change effects. So up till 2009, the negotiation text recognised the need to take measures for international climate migrants as well as internal migrants. The reference to “the international level” should however not be interpreted as referring to international mobility solely. According to Vikram Kolmannskog, “[i]t should rather be interpreted to encompass international cooperation as well as international standards to address, *inter alia*, migration and displacement, whether such movements are internal or cross-border”⁶⁵⁵. Even though most environment-induced migration will occur within states, the issue is obviously of international concern. This negotiation text was discussed without further modifications, and was then carried forward to the international climate conference in Copenhagen in December 2009.

1.2.3.2. Copenhagen: a step forward for migration

From 7-19 December 2009, at the UN Climate Change Conference in Copenhagen in Denmark, COP15 and COP/MOP 5 were held, together with the 8th Session of the AWG-LCA and the 10th Session of the AWG-KP. The Copenhagen conference was crucial in the negotiation process towards an agreed outcome for a post-2012 climate regime. Over 40.000 persons, including government delegates, observers and international organisations and the media, attended the meeting. However, while

⁶⁵⁴ UNFCCC, Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) on its Seventh Session, held in Bangkok from 28 September to 9 October 2009, and Barcelona from 2 to 6 November 2009, FCCC/AWGLCA/2009/14, 20 November 2009, Non-paper no. 41 of 5 November 2009, p. 54.

⁶⁵⁵ V. Kolmannskog, ‘Towards a Humanitarian Climate Change Agreement’, in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf, p. 23.

some significant steps were taken on the infrastructure of the new climate agreement, and the inclusion of adaptation measures and disaster risk reduction, little progress was made on the more controversial issues such as the reduction of greenhouse gas emissions, funding, and the assistance of richer nations to developing nations. The discussions in Copenhagen were marked by disagreements over the negotiation process itself and its transparency.

Informal negotiations in small groups consisting of a few major economies and representatives of regional and other negotiating groups finally resulted in a political agreement, the 'Copenhagen Accord'⁶⁵⁶. This Accord reflects the political will to cut greenhouse gas emissions, in order to limit the global average temperature increase to no more than 2°C above pre-industrial levels. However, there was no agreement on how to reach this ambitious goal. During the closing plenary session, heated discussions on the acceptance of the Accord divided developing and developed country Parties. Although many supported adopting the Copenhagen Accord as a COP decision, as a first step in the process towards a binding agreement, some developing countries opposed the Accord due to the lack of transparency of its conclusion. The Accord was rejected by the Bolivarian Alliance⁶⁵⁷, Sudan and Tuvalu, so the necessary consensus for a COP decision was lacking⁶⁵⁸ (*see further on the adoption procedure of COP decisions by consensus in Section 2.3.1.4.*). In the end, the negotiating Parties agreed that the COP would 'take note' of the Accord, and that countries could indicate their support to the text⁶⁵⁹. In Copenhagen, the COP and COP/MOP also decided to extend the mandates of the AWG-LCA and the AWG-KP, with a view to present their outcomes one year later at COP 16 in Cancun⁶⁶⁰.

Although overall, the Copenhagen summit was unsuccessful in reaching an 'agreed outcome' on long-term cooperative action on climate change, for the issue of climate-induced migration, it represented a small step forward. In Copenhagen, AWG-LCA delegates continued to work on the text with elements for a broader adaptation framework, which still contained a lot of brackets at that time. The edited mobility reference was still present in this text, but it received some resistance.

⁶⁵⁶ UNFCCC, Copenhagen Accord of 18 December 2009, Decision 2/CP.15, adopted at the Conference of the Parties on its Fifteenth Session, held in Copenhagen from 7 to 19 December 2009, FCCC/CP/2009/11/Add.1, 30 March 2010 (hereafter: Copenhagen Accord).

⁶⁵⁷ The 'Bolivarian Alliance for the Peoples of Our America' (ALBA) consists of Bolivia, Cuba, Ecuador, Nicaragua, Venezuela, the Dominican Republic, Antigua and Barbuda, Honduras, Saint Vincent and the Grenadines.

⁶⁵⁸ L. Rajamani, 'The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves', 60 *International and Comparative Law Quarterly*, April 2011, p. 499-500.

⁶⁵⁹ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2.

⁶⁶⁰ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2.

Australia for example tried to narrow it down, and demanded more research⁶⁶¹. At this crucial momentum for the emergence of human mobility in the international climate framework, experts and international organisations attending the Copenhagen summit managed to convince Parties of the importance to include the issue in the outcome of their discussions⁶⁶².

Nevertheless, disagreement arose on the structure of the paragraph including migration and displacement. Some Parties proposed to add a whole series of related rights and themes to the paragraph, such as human rights, 'Mother Earth'-issues, climate justice, and compensation for vulnerable people. However, up till then, discussions around human mobility in the UNFCCC had treated climate-induced migration as a substantive technical issue within a much larger adaptation agenda. Bundling it with more political issues would slow down the negotiation process. Delegates feared that the paragraph "was becoming loaded down" with issues where Party views diverged widely⁶⁶³. Furthermore, the UNFCCC is not a rights-based forum. Commitments for states are voluntary, not binding. A rights-based perspective, including human rights in the paragraph on climate-induced mobility, would render it even more difficult to come to an agreement⁶⁶⁴. In order to keep the issue of migration and displacement on the agenda, some delegates therefore decided to separate those issues. Human rights and topics just as 'Mother Earth' and the survival of all nations and peoples were moved into the perambulatory text⁶⁶⁵, while the entry on migration, displacement and planned relocation kept its place as part of a list of activities that could be considered as

⁶⁶¹ C. Lawton, 'What about Climate Refugees? Efforts to Help the Displaced Bog Down in Copenhagen', Spiegel online, 17 December 2009.

⁶⁶² K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 10.

⁶⁶³ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 9-10.; K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 9.

⁶⁶⁴ K. Warner, 'Migration as Adaptation in the UNFCCC Climate Negotiations', Presentation at the Conference on 'Climate Change and Migration in the Asia-Pacific: Legal and Policy Responses', Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW, NSW Parliament House, Sydney, Australia, 10-11 November 2011, available at: <https://tv.unsw.edu.au/Video/Climate-Change-and-Migration-Session-4>.

⁶⁶⁵ UNFCCC, Work undertaken by the Conference of the Parties at its fifteenth session on the basis of the report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, prepared for the Sixteenth Session of the Conference of the Parties, held from 29 November to 10 December 2010, FCCC/CP/2010/2, 11 February 2010, Annex I, p. 4-5.

‘adaptation action’. Within this bigger package of climate change adaptation, it was easier to make progress on migration⁶⁶⁶.

The outcome of the work of the AWG-LCA in Copenhagen contained the following paragraph on climate-induced human mobility in Annex II on *Enhanced Action on Adaptation*:

“4. Invites all Parties to enhance adaptation action under the Copenhagen Adaptation Framework

[for implementation] taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, [and whereby developing country Parties shall be supported by developed country Parties and in accordance with paragraph 6 below], to undertake, inter alia:

(f) Measures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate”⁶⁶⁷.

Even though COP15 resulted in a mere political agreement, without legal standing in the international climate regime, some important steps were taken. As discussed above, the Copenhagen Accord emphasised the importance of adaptation measures. Parties also agreed that developed countries should provide adequate funding, technology and capacity-building to support adaptation in developing countries⁶⁶⁸. It was not clear however to what extent migration, displacement and planned relocation should be part of such adaptation action. According to Warner, paragraph 4(f) lays “the basis for activities down the road in research, policy, and practice” on climate-induced mobility⁶⁶⁹. Furthermore, the activities listed in paragraph 4 might qualify for adaptation-related

⁶⁶⁶ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 10.

⁶⁶⁷ UNFCCC, Work undertaken by the Conference of the Parties at its fifteenth session on the basis of the report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, prepared for the Sixteenth Session of the Conference of the Parties, held from 29 November to 10 December 2010, FCCC/CP/2010/2, 11 February 2010, Annex II on Enhanced Action on Adaptation, §4(f), p. 14.

⁶⁶⁸ Copenhagen Accord, paragraph 3; S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 400-401.

⁶⁶⁹ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 10; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global

funding. In this sense, the phrase “measures to enhance understanding” within paragraph 4(f) could be interpreted by states and other international donors as an invitation to invest in enhancing the knowledge base on climate-induced migration, displacement and planned relocation. The possibility to finance human mobility within the climate change framework will be discussed further under Section 2.4.2. Finally, in Copenhagen, the inclusion of human mobility within the UNFCCC process was confirmed, which counts as a significant step forwards, and gave some legitimacy to the topic at the international level. After the Copenhagen summit, NGO’s, academics and some developing countries therefore kept on lobbying for the formal recognition of migration as part of adaptation action in a legally binding agreement.

1.2.3.3. From Copenhagen to Cancun: the Bonn and Tianjin negotiations

In the months after COP 15, the international community needed to get over the disappointment of the Copenhagen summit. The negotiating Parties felt that at least something needed to be achieved in Cancun, in order to restore the trust in the UNFCCC. In 2010, the AWG-LCA, which mandate was prolonged after the failure of Copenhagen, met three times for negotiations in Bonn. In April, the AWG-LCA delegates focused on the organisation and working methods in order to achieve the required outcome in Cancun. A new draft of the negotiation text was prepared by the Chair, discussed during the June Session, and revised again for the 11th Session of the AWG-LCA in August⁶⁷⁰. However, as most points of disagreement in the text on adaptation action had already been resolved on the road to and in Copenhagen, this part of the negotiation text did not change significantly during the first months of 2010⁶⁷¹. In fact, the AWG-LCA did not immediately re-open the discussions on the adaptation text in the progress towards COP16, and decided instead to zoom in on other key questions, such as emission reduction targets, which needed to be urgently resolved in the

Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 9.

⁶⁷⁰ UNFCCC, ‘Text to facilitate negotiations among Parties’, Note by the Chair, prepared for the Eleventh Session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA), held in Bonn, Germany from 2-6 August 2010, FCCC/AWG/LCA/2010/8, 9 July 2010; Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2-3.

⁶⁷¹ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 10.

process towards Cancun. Moreover, due to the disappointment in Copenhagen, many advocacy groups cut down their activities around humanitarian issues⁶⁷². Consequently, in line with the rest of the adaptation section, the paragraph on climate-induced mobility did not change during the Bonn negotiations⁶⁷³.

From 4-9 October 2010, delegates met in Tianjin during the last meeting of the AWGs before COP16 in Cancun. As the expectations for Cancun had been considerably scaled down, negotiators of both AWGs arrived at the Tianjin meeting with modest aspirations. The goal was no longer to come to a legally-binding instrument, but to achieve enough to give the international community the signal that a legally-binding outcome remains possible in the future. Delegates abandoned their previous statements, such as “nothing is agreed until *everything* is agreed”, and focused instead on identifying areas of convergence on those issues where an agreement could be reached within the remaining time before COP16⁶⁷⁴. The aim was to present a balanced set of decisions in Cancun, encompassing the key aspects of the Bali Action Plan, namely a shared vision for long-term cooperative action, mitigation, adaptation, finance, technology and capacity building⁶⁷⁵. However, this strategy rendered the discussions in Tianjin more difficult. In the AWG-LCA meeting, many parties desired decisions on all elements of the BAP. This meant that there would be no agreement on the well-developed texts

⁶⁷² K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 11; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 10.

⁶⁷³ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 11; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 10.

⁶⁷⁴ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 15.

⁶⁷⁵ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 1-3, 15.

on adaptation, technology and REDD+⁶⁷⁶, as long as there would be no clarity on mitigation commitments⁶⁷⁷.

The Tianjin discussions, based on the negotiation text circulated in August 2010⁶⁷⁸, finally led to a mixed progress. Some areas, such as technology and REDD+ appeared to be further away from an agreement than in Copenhagen. In other areas, such as mitigation, it seemed no progress was made at all. More clarity was needed on some sensitive political issues, such as fast-start finance and the future of the Kyoto Protocol⁶⁷⁹. However, many delegates declared there was a positive negotiation attitude around the table, and parties were slowly getting over the trauma of Copenhagen. In this negotiation context, the elements of a possible Cancun Adaptation Framework were discussed⁶⁸⁰. The AWG-LCA drafting group on adaptation considered the options for institutional arrangements to enhance action on adaptation, as well as the mechanisms to address loss and damage, support for developing countries and reporting. The establishment of an Adaptation Committee received wide support, just as the establishment of a process for LDCs to formulate and implement National Adaptation Programmes of Action⁶⁸¹.

In Tianjin, the reference to climate-induced mobility was safeguarded within the adaptation section. A high level panel on climate-induced migration at the Global Forum on Migration and development in November 2010⁶⁸², as well as the announcement of a specific mentioning of migration and displacement within the IPCC's upcoming 5th assessment report, helped sustain the idea that human

⁶⁷⁶ The concept of 'Reducing emissions from deforestation and forest degradation in developing countries' (REDD) was introduced in the UNFCCC agenda at COP11 in Montreal in 2005. It aims to reduce and/or prevent deforestation, thus preventing the release of carbon emissions into the atmosphere.

⁶⁷⁷ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 15-16.

⁶⁷⁸ UNFCCC, 'Negotiating Text', Note by the Secretariat, prepared for the Twelfth Session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA), held in Tianjin, China from 4-9 October 2010, FCCC/AWG/LCA/2010/14, 13 August 2010.

⁶⁷⁹ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 3.

⁶⁸⁰ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 11.

⁶⁸¹ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 7.

⁶⁸² S. Martin and K. Warner, 'Impact of Climate Change on Migration and Development', Session 3.2. of Roundtable 3 on Migration and Development: Tools and Evidence for Policy and Institutional Coherence, paper prepared for the Civil Society Days, Global Forum on Migration and Development (GFMD), Mexico, 2010. The Global Forum on Migration and Development is a intergovernmental consultative process, established in 2007. Its goal is to address the migration and development interconnections in practical and action-oriented ways, in an informal, non-binding, voluntary and government-led process.

mobility must be incorporated in the international climate regime⁶⁸³. However, the wording of the mobility paragraph changed in Tianjin, for the first time after COP15. Further developments in research had brought about a more nuanced view at the negotiation table, which was reflected in a more differentiated form of paragraph 4(f) of the negotiation text⁶⁸⁴.

The earlier wording

“Measures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate”;

changed into

“Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels”⁶⁸⁵.

While the earlier version of the text could have been interpreted as recognising the existence of separate categories of mobility according to the destination of climate-induced migrants, the new wording leaves this distinction between national, regional and international migration behind⁶⁸⁶.

⁶⁸³ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 6-7.

⁶⁸⁴ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 7; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 10-11.

⁶⁸⁵ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 11.

⁶⁸⁶ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 11; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global

Instead, it now underlines the diversity of the levels (national, regional and international) where measures on climate-induced mobility are needed (*see further under Section 2.2.2.*).

During the AWG-LCA's closing plenary, the Chair presented its report containing possible components of a package of decisions, respecting the two-track approach under the UNFCCC negotiation process⁶⁸⁷. A key concern of the negotiating parties in Tianjin was to ensure that the adoption of this balanced set of decisions would not be regarded as the end of the negotiations for a post-2012 climate regime. Therefore, the Cancun outcome would have to declare that the ultimate goal of the negotiations remains a legally-binding outcome, and would have to establish a programme for achieving this goal⁶⁸⁸.

2. MIGRATION, DISPLACEMENT AND RELOCATION IN THE CANCUN ADAPTATION FRAMEWORK

2.1. The Cancun Agreements

2.1.1. Restoring hope for the climate

At COP16 in Cancun, the international community had to face the challenge of agreeing on the components of a new climate deal in a very complex and fragile equilibrium between different negotiating blocks. Due to profound preparatory groundwork in the months leading to COP16, the Cancun summit produced a set of COP and COP/MOP decisions, united in the Cancun Agreements. These Agreements, concluded on 11 December 2010 under both the AWG-LCA and the AWG-KP negotiation track, integrated some of the compromises reached in the Copenhagen Accord into the formal UNFCCC regime. According to Rajamani, the Cancun Agreements “deploy artful drafting in the

Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 11.

⁶⁸⁷ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 9.

⁶⁸⁸ Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 16.

face of seemingly irreconcilable differences”⁶⁸⁹. The most important Agreement for this study is the “Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention”⁶⁹⁰.

The Cancun Agreements represent an important step forward in the fight against global warming, and in helping developing countries to protect themselves from the adverse effects of climate change. The negotiating Parties expressed their intention to limit greenhouse gas emissions so as to keep global temperature rise below two degrees Celsius above pre-industrial levels, and they included a time schedule to review their progress towards this objective⁶⁹¹. Furthermore, Parties agreed upon the most comprehensive package ever to help developing nations to deal with climate change, including agreements on finance, technology and capacity-building. A Green Climate Fund was established to support concrete mitigation and adaptation projects in developing countries in the future⁶⁹², while a fast-start finance system had to provide developing countries with new and additional resources, amounting to 30 billion USD for the period 2010-2012⁶⁹³. Furthermore, a Technology Mechanism was created to support the innovation, development and spread of climate-friendly technologies⁶⁹⁴. The Agreements also include measures for the prevention of deforestation⁶⁹⁵, and the monitoring, reporting and verification (MRV) of mitigation and adaptation projects. Finally, the Cancun Adaptation Framework was established to enhance action on adaptation (*see further below in Section 2.1.2.*)⁶⁹⁶.

The Cancun Agreements were widely applauded in the closing plenary session at COP16 (except by Bolivia, which expressly objected to the Agreements; *see further under Section 2.3.1.4.*). According to Patricia Espinosa, the Mexican Secretary of Foreign Affairs and president of the Cancun conference, they launched “a new era of international cooperation on climate change”⁶⁹⁷. Although the Cancun summit started perhaps with not much ambitious goals, at least it succeeded in restoring

⁶⁸⁹ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 502.

⁶⁹⁰ UNFCCC, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Decision 1/CP.16, adopted at the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1 (hereafter referred to as: Cancun Agreements, AWG-LCA Outcome Decision).

⁶⁹¹ Paragraphs 4 and 138-140 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁶⁹² Paragraph 102 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁶⁹³ Paragraph 95 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁶⁹⁴ Paragraph 117 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁶⁹⁵ Paragraphs 68-79 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁶⁹⁶ Paragraph 13 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁶⁹⁷ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 499.

the trust in the UNFCCC regime that was lost in Copenhagen the year before⁶⁹⁸. The Cancun process has delivered the best of what could realistically be achieved: although it did not come closer to a legally-binding agreement, at least it gave a signal that there was still hope to come to such an agreement in the future. The Cancun Agreements showed an increasing will among the negotiating Parties to protect poor and vulnerable communities in developing countries from climate change impacts. However, the Agreements were not the end of the negotiations on a post-2012 climate regime. Even though Parties agreed to limit global temperature increase to a maximum of two degrees Celsius, they did not agree upon clear and binding emission reduction targets. The future of the Kyoto Protocol was left unresolved. Furthermore, some of the benefits agreed upon in Cancun could not be fully realised until many details of the initiatives were further elaborated. And finally, even though the form of the final outcome of the negotiations was still unclear, a legally-binding agreement remained the ultimate goal to achieve.

2.1.2. Strengthening adaptation action through the Cancun Adaptation Framework

With the adoption of the Cancun Agreements, the focus of the international climate community clearly shifted from mitigation to adaptation, reflecting increased support for developing countries to adapt to the adverse effects of climate change. As for adaptation measures, the negotiating Parties in Cancun delivered what they had promised, which is making progress in defining a comprehensive adaptation framework, enabling all states to share knowledge on adaptation and helping developing countries to develop and implement adaptation actions.

The Cancun Agreements affirm that “[a]daptation must be addressed with the same priority as mitigation and requires appropriate institutional arrangements to enhance adaptation action and support”⁶⁹⁹. Parties also agreed that

“adaptation is a challenge faced by all Parties, and that enhanced action and international cooperation on adaptation is urgently required to enable and support the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing country Parties, taking into

⁶⁹⁸ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 519.

⁶⁹⁹ Paragraph 2(b) of the Cancun Agreements, AWG-LCA Outcome Decision.

account the urgent and immediate needs of those developing countries that are particularly vulnerable”⁷⁰⁰.

With the aim of enhancing adaptation action, as required by the Bali Action Plan, Parties established the Cancun Adaptation Framework⁷⁰¹. Under this Framework, which is the result of three years of intensive negotiations on adaptation, states are invited to

“enhance action on adaptation..., taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances”⁷⁰².

The Cancun Agreements call for countries to plan, prioritise and implement adaptation actions at the national level, taking into account local and national vulnerabilities⁷⁰³. Countries can further enhance adaptation action through, *inter alia*, impact, vulnerability and adaptation assessments⁷⁰⁴, by strengthening institutional capacities and enabling environments for adaptation⁷⁰⁵, by building resilience of socio-economic and ecological systems⁷⁰⁶, by enhancing climate change related disaster risk reduction strategies⁷⁰⁷, through research, development and transfer of technologies and capacity-building⁷⁰⁸, and by improving climate-related research and systematic observation for climate data collection and modelling⁷⁰⁹. Remarkably, this list of possible adaptation measures also refers to climate-induced human mobility in paragraph 14(f). This paragraph, which will be discussed further below, will go down in history as the first ever mentioning of climate migration in an official COP decision within the international climate regime.

In addition to the Cancun Adaptation Framework, COP16 also launched the creation of the Adaptation Committee⁷¹⁰. This new Committee is charged with the task of providing support for the implementation of the above mentioned country-driven adaptation measures. It can do this by, *inter alia*, providing technical support and guidance to states⁷¹¹, strengthening knowledge-sharing⁷¹², and

⁷⁰⁰ Paragraph 11 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰¹ Paragraph 13 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰² Paragraph 14 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰³ Paragraph 14(a) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰⁴ Paragraph 14(b) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰⁵ Paragraph 14(c) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰⁶ Paragraph 14(d) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰⁷ Paragraph 14(e) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰⁸ Paragraph 14(g) and (h) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁰⁹ Paragraph 14(i) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹⁰ Paragraph 20 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹¹ Paragraph 20(a) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹² Paragraph 20(b) of the Cancun Agreements, AWG-LCA Outcome Decision.

promoting synergy between various stakeholders⁷¹³. Furthermore, the Adaptation Committee can provide information and recommendations to the COP, drawing on good practices⁷¹⁴, and consider information of states on their monitoring and review of adaptation measures⁷¹⁵. At COP17, which took place in Durban, South Africa in November-December 2011, Decision 2/CP.17 further established the modalities and procedures for the functioning of the Adaptation Committee⁷¹⁶.

The Cancun Agreements also established a process for the least developed countries (LDCs) and other interested developing states to formulate and implement national adaptation plans as a means of identifying their adaptation needs and implementing strategies addressing those needs⁷¹⁷. The SBI Work Programme on Loss and Damage was created to address loss and damage from climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change⁷¹⁸ (*see further below in Section 3.2.*). Parties are invited to consider options on how to manage and reduce loss and damage, including the possible development of a climate risk insurance facility, micro-insurance and resilience-building through economic diversification, and ways to address rehabilitation from the impacts of slow-onset events⁷¹⁹.

Together with the creation of the Green Climate Fund, the establishment of the Cancun Adaptation Framework, aimed at enhancing action on adaptation in a coherent manner, was generally considered as a positive step forward⁷²⁰. It lays a stronger foundation for environmentally-vulnerable countries to formulate adaptation strategies, taking into account the vulnerabilities and migration needs of vulnerable communities. However, whether the Cancun Agreements do more than confirming everyone's good intention, is sometimes questioned. Many details of the agreements, such as the composition of and modalities and procedures for the Adaptation Committee, were left for further elaboration. At COP17 in Durban, the implementation of the Cancun Adaptation Framework was further advanced, as Parties agreed on procedures for the Adaptation Committee,

⁷¹³ Paragraph 20(c) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹⁴ Paragraph 20(d) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹⁵ Paragraph 20(e) of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹⁶ UNFCCC, Decision 2/CP.17 on the 'Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', adopted by the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, p. 4-54, § 93-119.

⁷¹⁷ Paragraph 15 -16 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹⁸ Paragraph 26 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷¹⁹ Paragraph 28 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷²⁰ See for example for the analysis of EU Environmental Ministers: Council of the European Union, Press Release at the 3061st Meeting on the Environment, Brussels, 20 December 2010, available at: http://www.consilium.europa.eu/Uedocs/Cms_Data/Docs/Pressdata/En/Envir/118652.Pdf, p. 13.

activities to be undertaken under the SBI Work Programme, and modalities and guidelines for the national adaptation plans⁷²¹.

These developments in the area of adaptation to the adverse effects of climate change are crucial to vulnerable communities, whose emigration pressure has raised due to the impacts of global warming. The next Section will discuss the possible measures that could emerge from the inclusion of human mobility in the Cancun Adaptation Framework.

2.2. Paragraph 14(f) on migration, displacement and planned relocation

The past decennia, the topic of climate-induced human mobility has gone through a long negotiation process, in the shade of politically more difficult topics such as emission reduction targets and climate finance. At the AWG-LCA meeting in Tianjin, the reference to climate migration in the negotiation text changed for the last time, and was then carried forward to COP16 in Cancun.

With the adoption of the Cancun Agreements, the reference to climate change-induced migration, displacement and planned relocation was secured in an official COP outcome. The Cancun Adaptation Framework now includes paragraph 14(f), which reads as follows:

“14. Invites all Parties to enhance action on adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, the following:

....

(f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels”⁷²².

As discussed above, the new structure of the text clarifies that climate change leads to various types of human mobility, which demand for different types of policy measures, to be implemented at three

⁷²¹ UNFCCC, Decision 2/CP.17 on the ‘Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention’, adopted by the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 march 2012, p. 4-54.

⁷²² Paragraph 14(f) of the Cancun Agreements, AWG-LCA Outcome Decision.

policy levels⁷²³. The issue is included in a list of activities which the Cancun Adaptation Framework regards as possible adaptation measures. In contrast to earlier versions of the negotiation text, climate-induced migration is not treated as a stand-alone provision, which would in fact have attached a different weight to the topic. Instead, the current text placement recognises that human mobility might be part of adaptation action in the future⁷²⁴. Although it is treated as a rather technical matter, due to its placement in the agreed text, paragraph 14(f) can have important effects. In particular, the adaptation measures listed in paragraph 14 might qualify for adaptation financing in the future⁷²⁵. This and other implications of paragraph 14(f) will be discussed further in Sections 2.4 and 2.5. First, this Section delves further into the actual wording of paragraph 14(f), and the kind of activities which could emanate from the inclusion of migration into the adaptation framework.

The text of the mobility reference outlines 3 types of climate-induced mobility (migration, displacement and planned relocation), 3 kinds of measures (understanding, coordination and cooperation), and 3 policy levels to address the issue (the national, regional and international level). Based on this structure of paragraph 14(f), Warner has developed a matrix of 27 permutations, which can serve as a basis to discuss possible measures arising from this paragraph⁷²⁶.

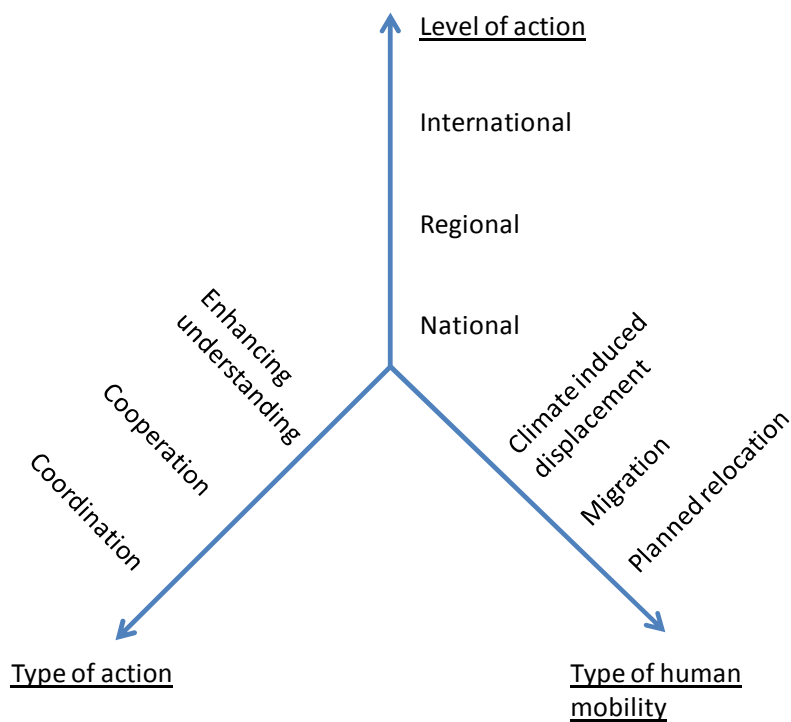
⁷²³ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 12; K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 11.

⁷²⁴ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 10.

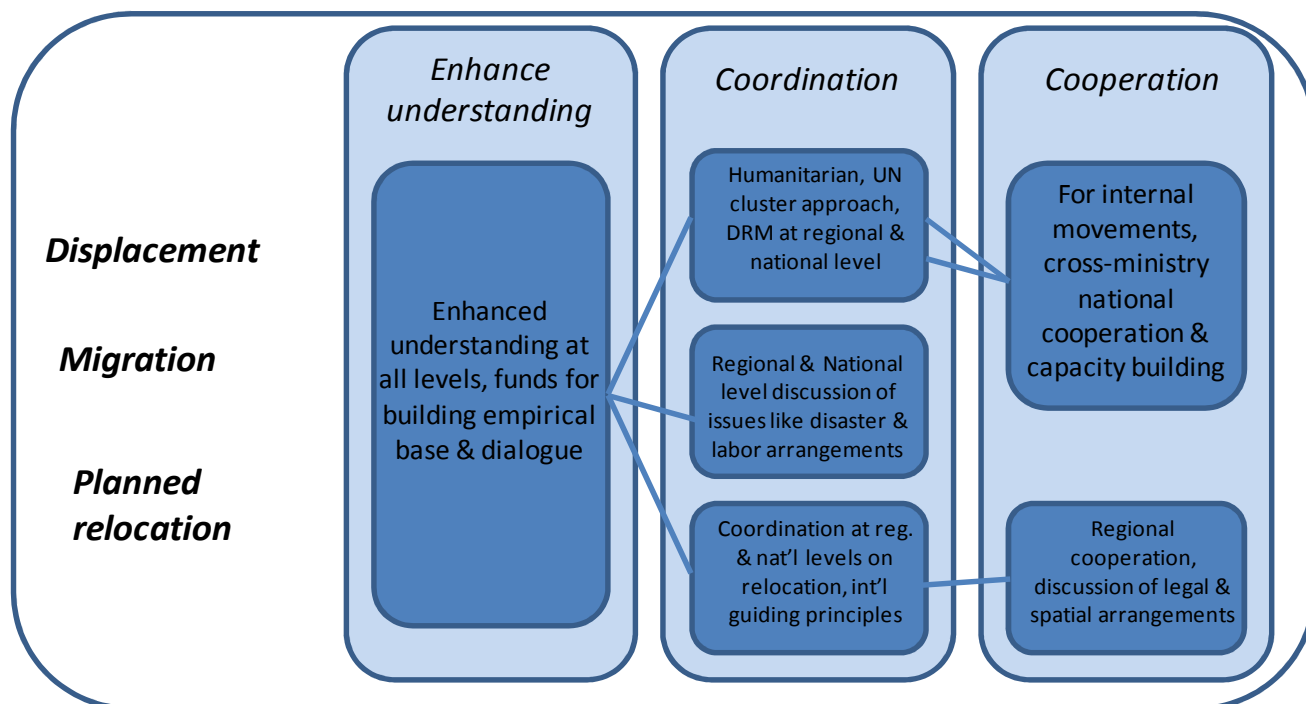
⁷²⁵ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 4.

⁷²⁶ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 22-23.

Figure: matrix with structure of paragraph 14(f): type of human mobility and action, levels of action⁷²⁷



⁷²⁷ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 23.

Figure: possible types of measures that could emerge related to paragraph 14(f)⁷²⁸

2.2.1. Type of mobility: migration, displacement and planned relocation

Climate change severely impacts upon people's livelihoods. In particular those communities who rely on ecosystem services for their livelihood are most vulnerable to the degradation of the environment⁷²⁹. For those regions where climate change mitigation measures are too little and come too late, people will have to adapt to a degrading environment. Where people are able to adapt, they might be able to remain in their environment. Where adaptation fails, people might be forced to leave their traditional habitat. While during the past decennia, most academic attention was focused on such forced environment-induced displacement, there is now a growing recognition that

⁷²⁸ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 23.

⁷²⁹ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009.

migration itself might be one of the possible strategies to adapt to a changing environment (see above in Chapter III)⁷³⁰.

The adverse effects of climate change thus lead to different kinds of human mobility, as discussed in PART I of this thesis. Environmental changes influence national and international migration patterns in three ways: evidence from field-based research confirmed that environmental changes act as a push factor for internal as well as international migration. However, people not only migrate out of areas with high environmental risks, but also move into vulnerable areas. Finally, environmental degradation also leads to “immobility”, as it often limits people’s capacity to move. After all, migration requires substantial social, economic and human capital. As the adverse effects of climate change will dismantle parts of this capital, it is expected that large populations will become “trapped” in vulnerable regions, without being able to migrate to better areas⁷³¹.

While earlier versions of the negotiation text randomly used the terms climate-induced ‘migration’ or ‘climate refugees’, the terminology of paragraph 14(f) seems to be more thought-out. With the reference to both migration, displacement and planned relocation, the drafters recognised the diversity of human mobility caused by climate change. While *migration* refers to the individual choice of people to leave a degrading environment, or at least to choose a point of departure and destination, *displacement* refers to those which are forced to leave their destructed environment in order to survive. Finally, the drafters also considered human mobility in a more organised way, by including the *planned relocation* of a population in the face of environmental disruptions.

Within the debate on migration and environmental change, it is necessary to discuss which possibilities can allow vulnerable communities to remain in their original habitat, and how to protect environmentally displaced persons who have no other option but to leave their destructed environment. However, one of the most important messages from environmental and social scientists, is that we need to increase the range of adaptation alternatives available to vulnerable communities. In this sense, human mobility itself has been recognised as an important adaptation strategy. Both ‘planned relocation’, moving populations in an organised way to less vulnerable places and facilitated ‘migration’, broadening the opportunities for individuals to migrate, can help people to adapt to a changing environment.

⁷³⁰ See for an extensive discussion of migration as an adaptation strategy: N. de Moor, ‘Labour Migration for Vulnerable Communities: A Strategy to Adapt to a changing Environment’, COMCAD Working Paper N° 101, 2011, Centre on Migration, Citizenship and Development, presented at the ESF-UniBi-ZiF Research Conference on ‘Environmental Change and Migration: From Vulnerabilities to Capabilities’, Bad Salzuflen, Germany, 5-9 December 2010, available at: http://www.uni-bielefeld.de/tidrc/ag_comcad/downloads/Panel_6_de-Moor.pdf.

⁷³¹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011.

It is therefore only to be applauded that both migration and planned relocation are listed in paragraph 14(f) among a range of possible adaptation actions. However, remarkably, also measures regarding displacement are listed as adaptation measures, while in fact displacement should be considered as a failure of adaptation. The reference to displacement in paragraph 14(f) should therefore be interpreted as measures to enhance understanding, coordination and cooperation with regard to the *prevention* of displacement, and the *protection* of climate-induced displaced persons.

Finally, *planned relocation* of large populations may be an option for governments in the face of predicted environmental degradation, such as sea level rise (permanent relocation), or sudden-onset natural disasters (temporary relocation). In the Foresight Report, 'planned relocation' is defined as "the movement of people, typically in groups or whole communities, as part of a process led by the state or other organisation, to a predefined location"⁷³². This category also includes persons who need to be relocated in the wake of large mitigation projects, such as the production of agrofuels and hydropower plants, or due to large-scale adaptation projects, such as sea walls, replanting of mangroves, and restoration of marshlands⁷³³. It should be noted that planned relocation can occur on a continuum from voluntary to forced human mobility. Faced with drought and desertification, relocation can be promoted as part of a variety of policy alternatives, while in case of the so-called sinking island states, it might have to be considered as a necessary adaptation for the survival of the inhabitants. However, planned government-led resettlement is sometimes used as a cover for forced evictions of certain parts of the population, based on political, cultural or racial grounds. In such cases, 'planned relocation' is a disguise for forced displacement, and should be treated that way.

2.2.2. Level of action: national, regional and international level

As discussed above, the first draft negotiation texts which finally led to paragraph 14(f) of the Cancun Agreements, explicitly referred to national as well as international migration. However, the negotiators chose to leave out the explicit distinction between national and international movement.

⁷³² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 176.

⁷³³ E. Ferris, 'Planned Relocations, Disasters and Climate Change', Paper prepared for the Conference on 'Climate Change and Migration in the Asia-Pacific: Legal and Policy Responses', Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW, NSW Parliament House, Sydney, Australia, 10-11 November 2011, available at: http://www.brookings.edu/papers/2011/1110_relocation_disasters_cc_ferris.aspx, p. 1.

Instead, paragraph 14(f) now distinguishes between national, regional and international responses to the issue of climate-induced migration.

Even though most climate-related migration will occur within states, the issue is obviously of international concern. The reference to the international level should thus be understood as encompassing international cooperation and international standards to deal with climate-related migration, displacement and relocation, whether such movements are internal or across international borders⁷³⁴. Furthermore, various governmental agencies and non-governmental organisations involved in the environment or migration debate at the international level are now challenged by mixed-motive migration flows, and have up till now not clearly defined their role towards the issue of environment-induced mobility. Organisations such as UNEP, the UNHCR or the IOM can play a crucial role in the policy debate as well as on the field. The question whether the issue of environment-induced migration raises additional institutional needs at the international level therefore urgently needs to be addressed.

At the regional level, the policy approach towards environmental change and human mobility differs widely between different regions. While the population as well as policymakers in climate hotspots such as the South Pacific or Sub-Saharan Africa are since many years well-aware of climate-induced human mobility, the EU has long disregarded the issue (*see further below in Chapter VI, Section 2.1.*). However, if adaptation strategies fail within national borders, crucial responses might be found under the umbrella of regional cooperation. Not only should regional organisations raise more awareness on the issue, they could also contribute by funding more research to broaden the knowledge base on environment-induced mobility within, from or to their region. The European Commission has for example funded case studies under the EACH-FOR Project, with the aim of describing the causes of environment-induced forced migration and providing plausible future scenarios of environment-induced displacement⁷³⁵.

Human rights standards or guiding principles to deal with internally or internationally displaced persons or migrants might also be developed at the regional level. In October 2009, the African Union adopted for example the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)⁷³⁶. Specifically emphasising natural disasters and man-made

⁷³⁴ V. Kolmannskog, 'Towards a Humanitarian Climate Change Agreement', in *Climate Changed, People Displaced*, Norwegian Refugee Council, Thematic Report 2009, available at: http://www.nrc.no/arch/_img/9448674.pdf, p. 23.

⁷³⁵ For more information, see the project website: <http://www.each-for.eu>.

⁷³⁶ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted by the Special Summit of the African Union, held in Kampala (Uganda) on 23 October 2009, entered

disasters, including climate change, as one of the major causes of internal displacement, this Convention grants climate-induced migrants equal protection as other internally displaced persons⁷³⁷. As some states may carry a larger burden of affected populations moving across borders than others, one of the challenges is furthermore to ensure equitable burden-sharing of displaced or migrating populations within the region. In addition, reducing irregular border crossing as much as possible, as well as decriminalising forced environmentally-displaced persons moving across borders might be a task taken up by regional organisations. In tackling climate-induced migration and displacement, states could thus cooperate at the regional level, *i.a.* by creating migration opportunities and win-win migration projects between countries with a pressing emigration need and countries with labour shortages. For example the EU and Economic Community Of West African States (ECOWAS) models of free movement of citizens under certain conditions could serve as regional mobility models to be applied in other regions, perhaps with a more specific focus on environment-induced migrants⁷³⁸. The last PART of this thesis takes such a regional approach, aiming to identify a set of policy options for the EU to design appropriate legislation and regulatory frameworks to promote international adaptive migration.

Finally, a more systematic integration of human mobility patterns into national adaptation planning is recommended, together with the incorporation of environmental changes and adaptation plans into national migration policies⁷³⁹. States could for example take climate-induced population movements into account in rural and urban development planning or into their disaster risk management framework, or develop migration policies directed at vulnerable communities affected by the adverse effects of climate change. Some states have in the past admitted victims of natural disasters onto their territory on an *ad hoc* basis, or have already enacted asylum systems to grant

into force on 6 December 2012, 49 *ILM* 86 (hereafter: Kampala Convention). The Convention entered into force 30 days after the deposit of the instruments of ratification or accession by 15 Member States. With Swaziland as the 15th country ratifying the Convention, the Convention entered into force on 6 December 2012 (status as of 9 November 2012, see http://au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced..._0.pdf).

⁷³⁷ Article 1(k), Article 4(4)(f), Article 5(4) and Article 12(3) of the Kampala Convention. See M. Morel and N. de Moor, 'Migrations climatiques: quel rôle pour le droit international?', *Revue Cultures & Conflits* 88, 2012/4, hiver, p. 61-84.

⁷³⁸ M. Leighton, X. Shen and M. Zissener (eds.), 'New Policy and Institutional Frameworks to Better Protect Climate-Related Migrants', Summer Academy Synthesis Report, 2010 Summer Academy on Social Vulnerability, organized by the United Nations University Institute for Environment and Human Development (UNU-EHS) and Munich Re Foundation, Bonn, October 2010, p. 18-20.

⁷³⁹ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 15.

temporary protection to disaster-induced displaced persons⁷⁴⁰. The national, regional and international policy levels are thus complementary fora to address the issue of climate change-induced human mobility in a comprehensive manner.

2.2.3. Type of action: measures to enhance understanding, coordination and cooperation

Paragraph 14(f) outlines three kind of activities related to human mobility that could enhance adaptation action, that is: understanding, coordination and cooperation. Firstly, states and international organisations could support research, case studies, and pilot projects to widen the knowledge base on climate-related movement. Funding for empirical research could be made available at the national, regional and international level, depending on the needs and priorities of individual countries and organisations⁷⁴¹. As described in PART I of this study, in recent years several research projects have described the complex relationship between migration and environmental changes. However, despite this myriad of rather general research, there remains a need for more specific knowledge-building on environment-related migration. In particular on the implications of migration for adaptation, enhanced monitoring and pilot projects could form the basis of better-informed international dialogue and policy proposals. Furthermore, the Foresight Report proposes for example to give priority to understanding the resilience of communities that are moving to, or are trapped in, vulnerable urban areas, particularly in low-income countries⁷⁴².

Secondly, *cooperation* means for example that gaps must be closed between the humanitarian, development and climate change communities and policies⁷⁴³. According to Warner, this could be

⁷⁴⁰ W. Kälin and N. Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', UNHCR Legal and Protection Policy Research Series, PPLA/2012/01, Division of International Protection, February 2012, available at: [http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4f33f1729&query=Protecting People Crossing Borders in the Context of Climate Change](http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4f33f1729&query=Protecting+People+Crossing+Borders+in+the+Context+of+Climate+Change), p. 45-46.

⁷⁴¹ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 23-24.

⁷⁴² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 201.

⁷⁴³ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement,

achieved by “factoring climate change adaptation considerations into existing national development plans or into Poverty Reduction Strategy Papers as well as into Disaster Risk Reduction Strategies (DRRs) and other risk management strategies aimed at building resilience and reducing vulnerability”⁷⁴⁴. States on the other hand might cooperate on an operational level, in order to manage increasing flows of climate-induced migrants and displaced persons. In case people are displaced in border areas, regional cooperation might be required, while examples of regional labour migration agreements may serve as models to facilitate international migration as an adaptation strategy⁷⁴⁵.

Finally, as for *coordination* measures, paragraph 14(f) will probably have the least impact on displacement, as this would probably continue to take place through coordination between humanitarian organisations and the UN cluster approach⁷⁴⁶. On the other hand, it is less clear how coordination on voluntary migration should take place, as this touches upon the important national prerogative of defining who can enter a country’s territory. Whether or not states decide to facilitate international adaptive migration therefore largely remains a matter of state sovereignty, and will be decided upon at the national, and not the international level. In certain regions however, such as the EU, coordination on voluntary migration might begin to be addressed at the regional level. Finally, coordination on planned relocation could gain importance in the future, as it becomes clear that certain populations, for example in the Pacific Island Nations, need to be entirely relocated. Similarly, large mitigation or adaptation projects might necessitate government-led population relocation.

convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 16.

⁷⁴⁴ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 16.

⁷⁴⁵ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 24. See for an example of such a labour migration project: N. de Moor Nicole, ‘Temporary Labour Migration for Victims of Natural Disasters: The Colombia-Spain Model’, in M. Leighton, X. Shen and K. Warner (eds.), *Climate Change and Migration: Rethinking Policies for Adaptation and Disaster Risk Reduction*, SOURCE n° 15/2011, Publication Series of UNU-EHS, April 2011, p. 92-103.

⁷⁴⁶ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 24.

Although such measures will mainly be discussed at the national level, guiding principles could be developed at the regional or international level⁷⁴⁷.

The future will have to clarify what kind of measures do actually emerge from this paragraph, but it is clear that the negotiators did not want to go any further than this. Paragraph 14(f) *invites* states to take measures regarding the understanding, coordination and cooperation on climate-induced mobility, but it does not ‘invite’ them to grant residence rights to climate-induced displaced persons, or to facilitate international migration as an adaptation strategy for the most affected and vulnerable populations. This rather ‘weak’ language is one of the reasons why the topic of climate migration survived many years of negotiations.

2.3. Legal value and enforcement of human mobility in the Cancun Adaptation Framework

When in 2007 the Bali Action Plan launched the negotiation process to come to an ‘agreed outcome’ on long-term cooperative action on climate change, it was scheduled to reach this outcome in Copenhagen in December 2009⁷⁴⁸. However, as COP15 failed to achieve this goal, the mandates of the AWG-LCA and AWG-KP were extended for another year, with a view to come to an agreed outcome at COP16 in Cancun.

Although the Bali Action Plan urged Parties to reach an agreed outcome for a post-2012 climate regime, it did not specify the legal form which such an ‘agreed outcome’ should take⁷⁴⁹. The legal form of the agreed outcome was an important area of discussion in the process towards the Cancun conference. While some negotiating Parties preferred to conclude COP16 with a series of COP decisions with the AWG-LCA’s outcome, others gave preference to a new treaty or protocol, to

⁷⁴⁷ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 24.

⁷⁴⁸ Paragraph 1 of the Bali Action Plan.

⁷⁴⁹ Bali Action Plan; L. Rajamani, ‘The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 500; Earth Negotiations Bulletin, Vol. 12, N° 485, published by the International Institute for Sustainable Development, IISD, 12 October 2010, available at: <http://www.iisd.ca/Download/Pdf/Enb12485e.Pdf>, p. 2.

replace either to supplement the UNFCCC⁷⁵⁰. Other possible options included a set of COP decisions with a mandate to conclude a new treaty or protocol at one of the next COP meetings.

In order to better grasp the legal significance of the migration reference within the Cancun Adaptation Framework, this Chapter first explores the legal position of the Cancun Agreements in the progress towards an ‘agreed outcome’, before it assesses the possible legal value of the mobility reference itself. Finally, it briefly touches upon the question of compliance and enforcement of migration provisions within the Adaptation Framework.

2.3.1. Legal value of the Cancun Agreements

2.3.1.1. The Cancun Agreements: at last an ‘agreed outcome’?

The Cancun Agreements consist of a set of significant COP and COP/MOP decisions, concluded on 11 December 2010 under both negotiation tracks. They include Decision 1/CP.16 on the outcome of the work of the AWG-LCA⁷⁵¹, Decision 1/CMP.6 on the outcome of the work of the AWG-KP⁷⁵², and Decision 2/CMP.6 on land use, land-use change and forestry⁷⁵³.

The text of the Cancun Agreements itself makes clear that the Agreements do not constitute the “agreed outcome” as required by the Bali Action Plan. Already in the preamble, the COP notes that “nothing in this decision shall prejudice prospects for, or the content of, a legally binding outcome in

⁷⁵⁰ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 803; L. Rajamani, ‘The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 513.

⁷⁵¹ UNFCCC, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Decision 1/CP.16, adopted at the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1 (hereafter referred to as: Cancun Agreements, AWG-LCA Outcome Decision).

⁷⁵² UNFCCC, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Fifteenth Session, Decision 1/CMP.6, adopted at the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, FCCC/KP/CMP/2010/12/Add.1 (hereafter referred to as: Cancun Agreements, Kyoto Outcome Decision).

⁷⁵³ UNFCCC, The Cancun Agreements: Land Use, Land-Use Change and Forestry, Decision 2/CMP.6, adopted at the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, FCCC/KP/CMP/2010/12/Add.1.

the future”⁷⁵⁴. Furthermore, the mandate of the AWG-LCA is further prolonged⁷⁵⁵, in order to “continue discussing legal options with the aim of completing an agreed outcome based on decision 1/CP.13 (Bali Action Plan)”⁷⁵⁶. Although the AWG-LCA’s mandate was extended for one more year, the text did not stipulate a new deadline to come to such an agreed, legally-binding, outcome. This fostered the fear that the UNFCCC regime might be weakened in the absence of a new legal instrument⁷⁵⁷.

Although the Cancun Agreements were not the end of the quest for a legally binding ‘agreed outcome’, they do contain important provisions, among which the topic of this research. Therefore, it is important to assess what then the exact legal value is of the Agreements (*see further below in this Section*), more in particular of the migration paragraph (*see further in Section 2.3.2.*), and if and how they can be enforced (*see further in Section 2.3.3.*).

2.3.1.2. COP decisions as a source of public international law?

In the “treaty-based context” of international environmental law, often resulting from multilateral environmental agreements (MEAs) such as the UNFCCC, the creation of legal obligations usually depends on the explicit consent of State Parties⁷⁵⁸. Being the dominant source of international environmental law, MEAs represent a traditional hard law source of public international law, as enumerated in Article 38 of the Statute of the International Court of Justice (ICJ)⁷⁵⁹. They are generally adopted at a diplomatic conference, and need to be signed and ratified by a sufficient number of states to be brought into force. However, this standard procedure of law-making, set out in the Vienna Convention on the Law of Treaties⁷⁶⁰, has been found unsuitable for the expansion or modification of treaty obligations. In order to come up with timely responses to quickly changing environmental conditions, law-making in international environmental law has shifted from

⁷⁵⁴ Preamble of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁵⁵ Paragraph 143 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁵⁶ Paragraph 145 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁷⁵⁷ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 514.

⁷⁵⁸ J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* 1, 2002, p. 2; A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 234-235.

⁷⁵⁹ Article 38, Statute of the International Court of Justice, adopted in San Francisco on 26 June 1948.

⁷⁶⁰ Articles 9-18, 24, Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 *UNTS* 331.

conventional processes based on states' consent, towards more consensus-based and majority decision-making processes under the auspices of COPs as the MEA's institutional core⁷⁶¹.

The normative role of COPs in international environmental law has thus developed significantly. In MEA-based legislative processes, their tasks range from the interpretation of treaty obligations to the negotiation and adoption of texts to be ratified later by the MEA parties. In addition, most MEAs grant their COPs the authority to take measures to enhance the implementation of the treaty provisions. With this aim, COPs develop rules, modalities and procedures for the implementation of particular MEA provisions, discuss compliance, financial and organizational aspects of the treaty, and establish subsidiary bodies. Moreover, certain MEAs explicitly charge the COP to perform a number of specific tasks⁷⁶².

While most of this activity only addresses the internal operation of the MEA regime, some COP measures may touch upon the Parties' external obligations⁷⁶³. COPs may thus contribute to the interpretation, and even development, of international legal obligations. Even consensus-based resolutions and decisions taken by the COP can influence substantive obligations which Parties have under the underlying treaty. They can enrich Parties' obligations by thickening them, or "add to the fullness of the obligations by adding to the text of the original treaty through interpretation and guidance"⁷⁶⁴. However, as COP measures are tightly connected to the underlying treaty, they cannot create stand-alone legal obligations (*see further below*).

This normative influence of COPs rises the question how COP measures should be placed within the framework of the sources of public international law. Decisions of treaty bodies are not mentioned in Article 38 of the ICJ Statute, which only refers to international conventions, international customary law, general principles of international law, and the 'subsidiary' sources of judicial decisions and legal teachings⁷⁶⁵. However, this enumeration of sources of international law is not exhaustive⁷⁶⁶. Both

⁷⁶¹ See for an extensive discussion of this evolution : J. Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', 15 *Leiden Journal of International law* 1, 2002, p. 15-52.

⁷⁶² J. Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', 15 *Leiden Journal of International law* 1, 2002, p. 4; A. Wiersema, 'The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law*, 2009, p. 237, 252-253; R. Churchil and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *The American Journal of International Law* 4, 2000, p. 626.

⁷⁶³ A. Wiersema, 'The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law*, 2009, p. 237; R. Churchil and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *The American Journal of International Law* 4, 2000, p. 636-642.

⁷⁶⁴ A. Wiersema, 'The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law*, 2009, p. 237.

⁷⁶⁵ Article 38, Statute of the International Court of Justice, adopted in San Francisco on 26 June 1948.

resolutions of international organisations, although not legally binding, and soft law are generally recognised as important additional sources of public international law.

When COPs formally amend treaties or adopt protocols, Parties' consent is required to make the changes binding upon those Parties. When for example new international climate law comes into being through a protocol or amendment to the UNFCCC, the COP only acts as the forum in which the parties negotiate and adopt the protocol or amendment⁷⁶⁷. Such kind of COP activity clearly fits within the traditional sources of international law⁷⁶⁸. However, other COP decisions, such as the Cancun Agreements adopted by the COP16 to the UNFCCC, do not require the consent of every Party, nor do they foresee an opt-out system for dissenting Parties. Instead, such COP decisions are usually agreed upon through consensus of the Parties⁷⁶⁹ (*see further in Section 2.3.1.4.*). Quickly changing environmental conditions necessitate decision-making directly by the COPs, rather than subject to formal and often lengthy amendment procedures.

Some scholars refer to consensus-based COP decisions as soft law. The notion of soft law is generally understood to have two different meanings, based on the form either the substance of the relevant rule. It firstly refers to a range of non-legally binding instruments in the international field. In this sense, soft law is contrary to hard law instruments, which are always legally-binding. However, non-binding soft law instruments do have an important normative significance. They may serve as evidence of state practice or *opinio iuris* necessary for the creation of customary international law, or may constitute a subsequent agreement between Parties regarding the interpretation of treaty obligations. Furthermore, they sometimes influence national law-making, and are referred to by national and international courts⁷⁷⁰. Eventually, they may even lead to the adoption of legally-binding obligations through the conclusion of a treaty. Alternatively, soft law also refers to vague norms and principles, which are formulated as an encouragement rather than an obligation. Their vagueness, indeterminacy or 'soft' character contrasts to clear and specific commitments of hard law obligations. Even when contained in legally-binding instruments, these norms are regarded as soft

⁷⁶⁶ H. Thirlway, 'The Sources of International Law' in M.D. Evans (ed.), *International Law*, Second Edition, Oxford University Press, New York, 2006, p. 134-139.

⁷⁶⁷ Article 15 UNFCCC (amendments to the Convention) and Article 17 UNFCCC (Protocols).

⁷⁶⁸ J. Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law* 1, 2002, p. 17-18.

⁷⁶⁹ A. Wiersema, 'The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law*, 2009, p. 232.

⁷⁷⁰ A. Wiersema, 'The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law*, 2009, p. 260.

law, sometimes referred to as ‘legal soft law’⁷⁷¹. This Section will further focus on the form of the document (*i.e.* the legal value of the Cancun Agreements), while Section 2.3.2. will explore the legal character of its substance (more in particular paragraph 14(f)).

In the international legal framework, the notion of soft law is often used “to fill in the gap between non-law and traditional hard law”⁷⁷²: something is either law, non-law, or something in between. In particular in rapidly evolving legal areas, such as international environmental law, soft law has been used as an adaptable and easy applicable tool of international law-making⁷⁷³. For example the Rio Declaration on Environment and Development is usually described as a soft law document. However, according to Wiersema, the classification of COP decisions as soft law is oblivious of the particular relationship between consensus-based COP measures and the underlying treaty obligations. The “grey zone” of international law which soft law represents, is inadequate to describe the important legislative features of COP decisions in MEA-based law-making. While COP decisions do not create new stand-alone obligations, they can thicken, or in some cases even change, existing state obligations, giving them a clear legally normative role. Accordingly, the tripartite classification of hard law, soft law and non-law is inadequate to capture this normative role. Yet, despite their legislative character, COP decisions do neither fit within the traditional hard law sources of public international law⁷⁷⁴.

As using the notion of soft law to classify COP decisions is unhelpful, some scholars propose a different approach to describe the legal status of consensus-based COP activity. Instead of inquiring whether the Cancun Agreements are hard either soft law, we should pose the more concrete and relevant question whether its provisions can become legally-binding in international law. The “*de facto* law-making” power of COPs even calls our traditional view on the sources of international law into question⁷⁷⁵. Or as Wiersema puts it:

⁷⁷¹ A. Boyle, ‘Soft Law in International Law-Making’, in M.D. Evans (ed.), *International Law*, Second Edition, Oxford University Press, New York, 2006, p. 141-151; A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 260; P.-M. Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* 2, 1991, p. 429-431.

⁷⁷² A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 259, 262; P.-M. Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* 2, 1991, p. 420.

⁷⁷³ For an extensive discussion on the use of soft law in international environmental law, see: P.-M. Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* 2, 1991.

⁷⁷⁴ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 232-233, 259, 262-264.

⁷⁷⁵ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 264, 246.

“Whether or not COP activity is hard or soft law is not the most important question. Rather, it is more important to focus on understanding the role consensus-based COP activity plays in the international legal system and the implications of that role for states’ international legal obligations”⁷⁷⁶.

In exploring the legal status of the Cancun Adaptation Framework and its provisions, it seems thus necessary to explore whether or not the Agreements are legally binding to the Parties to the UNFCCC. Whether or not COPs have taken up a real legislative role, depends after all on whether their decisions may be binding upon all Parties to the respective treaty, regardless of their explicit consent to the COP’s decision.

2.3.1.3. Rephrasing the question: legally-binding nature of COP decisions

A. In general international law

Reframing the question of the categorisation of the Cancun Agreements as hard or soft law into one asking whether COP decisions contain legally-binding provisions, allows us to explore the particular relationship COP decisions have with their underlying treaty. In order to assess the legal value of COP decisions in the international climate regime, I will first discuss the legally-binding nature of COP decisions under general international law, before applying these principles to the UNFCCC context.

The legal status of COP decisions in public international law has been widely debated. At least, their legal status can be called “ambiguous”⁷⁷⁷. Most scholars agree that the legally binding nature of COP decisions firstly depends on the authority given to the COP by the treaty creating the COP. Through an “enabling clause”, the relevant treaty can authorize the COP to take legally-binding decisions⁷⁷⁸.

⁷⁷⁶ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 234.

⁷⁷⁷ J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* 1, 2002, p. 21-33.

⁷⁷⁸ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 824; J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* 1, 2002, p. 21-23; Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 1-4; Climate Action Network (CAN)

Furthermore, the legal status of a COP decision depends on the content of the decision itself, and the intent of the Parties⁷⁷⁹.

The authority for a COP to take legally-binding decisions must derive from the treaty itself. Treaty provisions can however grant such authority either explicitly or implicitly. Explicit grants of authority, expressly allowing the COP to change Parties' obligations in a substantive way, are rather exceptional⁷⁸⁰. An example of explicit powers ascribed to the COP is to be found in the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer, which grants the COP the power to impose significant changes to Parties' obligations to limit the consumption and production of controlled substances by way of adjustments to the protocol⁷⁸¹. Implicit grants of authority are used more frequently, and allow Parties to implement certain treaty provisions or to expand certain rules and modalities of the treaty⁷⁸². However, such implicit grants are a weaker basis for taking legally-binding decisions⁷⁸³. Moreover, some scholars argue that COP decisions can never create new substantive obligations for the Parties, as these would need to be adopted through the formal means of revising a treaty, requiring state consent⁷⁸⁴.

It is clear from the above that COP decisions introducing new obligations or changing existing obligations are not legally-binding, unless there is a treaty provision granting the COP the authority to take binding decisions in respect of those issues. However, even in case COP decisions lack legally-binding character, they can have important consequences. They firstly play an important role in the interpretation of treaties, as they can be regarded as a "subsequent agreement between the parties

International, 'COP Decisions: Binding or Not?', CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climatenetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 1-5.

⁷⁷⁹ L. Rajamani, 'Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime', 58 *International and Comparative Law Quarterly* 3, 2009, p. 824.

⁷⁸⁰ Legal Response Initiative, 'COP Decisions: Substance and Mandates', Web paper produced by the Legal Response Initiative, 4 October 2010, available at:

<http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 2.; Climate Action Network (CAN) International, 'COP Decisions: Binding or Not?', CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climatenetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 1-3.

⁷⁸¹ Article 2, Montreal Protocol on Substances that Deplete the Ozone Layer, Protocol to the Vienna Convention for the Protection of the Ozone Layer, adopted in Montreal on 16 September 1987, entered into force on 1 January 1989, 1522 *UNTS* 3.

⁷⁸² Legal Response Initiative, 'COP Decisions: Substance and Mandates', Web paper produced by the Legal Response Initiative, 4 October 2010, available at:

<http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 2.

⁷⁸³ Climate Action Network (CAN) International, 'COP Decisions: Binding or Not?', CAN Ad-Hoc Legal Working Group, 8 June 2009, available at:

http://www.climatenetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 3.

⁷⁸⁴ L. Rajamani, 'Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime', 58 *International and Comparative Law Quarterly* 3, 2009, p. 824.

regarding the interpretation of the treaty or the application of its provisions”⁷⁸⁵. Moreover, COP decisions are often framed in mandatory language, making certain conduct obligatory for the Parties, or making access to certain benefits dependent on compliance with mandatory terms⁷⁸⁶. It is important to keep in mind that these obligations, although formulated in a mandatory way, are not legally-binding obligations in international law without the necessary power attributed to the COP⁷⁸⁷.

B. In the international climate regime

As the legal character of COP decisions depends mainly on the power given to the COP in its respective treaty, it is impossible to generalise about the status of COP decisions⁷⁸⁸. In the international climate regime, neither the UNFCCC itself nor its Kyoto Protocol have explicitly empowered the COP, respectively COP/MOP, to adopt legally-binding decisions containing significant changes to Parties’ obligations⁷⁸⁹. However, there are some implicit grants of authority to be found in both the UNFCCC and the Kyoto Protocol. Both the COP and COP/MOP are firstly empowered to take measures regarding the implementation of the Convention and its Protocol. Article 7 UNFCCC authorizes the COP to review “the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt”, and to “make, within its mandate, the

⁷⁸⁵ Article 31(3)(a) of the Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 *UNTS* 331; L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 824; A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 247, 263.

⁷⁸⁶ J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International law* 1, 2002, p. 32.

⁷⁸⁷ Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 1.

⁷⁸⁸ Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 2.

⁷⁸⁹ Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 2; Climate Action Network (CAN) International, ‘COP Decisions: Binding or Not?’, CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climateactionnetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 3.

decisions necessary to promote the effective implementation of the Convention”⁷⁹⁰. To this end, the COP is not only authorized to examine Parties’ obligations⁷⁹¹, or to adopt reports and make recommendations on the implementation of the Convention⁷⁹², but also to “exercise such other functions as are required for the achievement of the objectives of the Convention as well as all other functions assigned to it under the Convention”⁷⁹³.

There is some discussion as to whether the COP has more than just this general power to implement the Convention. According to Rajamani, the COP is empowered to engage in the institutional as well as the normative development of the international climate regime⁷⁹⁴. Even for countries’ substantive obligations, the COP would have significant law-making powers. However, unlike the Kyoto Protocol, which contains various provisions mandating the COP/MOP to adopt rules on specific issues⁷⁹⁵, the UNFCCC does not grant the COP much rule-making powers⁷⁹⁶. Article 4 UNFCCC, which contains the primary commitments of Parties, does only refer to the COP in some specific paragraphs. As for the commitment to reduce greenhouse gas emissions, the COP is for example allowed to review Parties’ information⁷⁹⁷, agree on methodologies for the calculation of emissions by sources and removal by sinks of greenhouse gases⁷⁹⁸, and review the adequacy of measures contained in the Convention⁷⁹⁹. Although Article 4(2)(d) also grants the COP the authority to “take appropriate action”, including the adoption of amendments to the Convention’s commitments on emission reductions, the Parties chose to adopt binding emission reduction targets for Annex I Parties through the Kyoto Protocol, instead of through a COP decision⁸⁰⁰. Such a protocol is, just as an amendment to the treaty, subject

⁷⁹⁰ Article 7(2) UNFCCC.

⁷⁹¹ Article 7(2)(a) UNFCCC.

⁷⁹² Article 7(2)(f) and (g) UNFCCC.

⁷⁹³ Article 7(2)(m) UNFCCC.

⁷⁹⁴ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 824-825.

⁷⁹⁵ See for example Article 17 of the Kyoto Protocol, which authorizes the COP to develop “principles, modalities, rules and guidelines” for emissions trading, and Article 18 of the Kyoto Protocol, which mandates the COP to adopt compliance procedures and mechanisms entailing binding consequences through an amendment to the Protocol.

⁷⁹⁶ Climate Action Network (CAN) International, ‘COP Decisions: Binding or Not?’, CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climateactionnetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 4.

⁷⁹⁷ Article 4(2)(b) UNFCCC.

⁷⁹⁸ Article 4(2)(c) UNFCCC.

⁷⁹⁹ Article 4(2)(d) UNFCCC.

⁸⁰⁰ Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 3-4; Climate Action Network (CAN) International, ‘COP Decisions: Binding or Not?’, CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climateactionnetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 4.

to a consent-based formal adoption procedure, instead of a consensus-based procedure, thus only binding states that have explicitly agreed to be bound by it.

Whether or not the COP can actually adopt legally-binding measures, would thus depend on the content of the measures themselves. If those measures merely consist of an elaboration of obligations already enshrined in the Convention, the authority of the COP depends on whether the specific article of the Convention provides a sufficient legal basis to adopt such measures through a COP decision. As for the issue of finance, Article 11(1) UNFCCC states for example that the COP shall decide on the “policies, programme priorities and eligibility criteria” of a new financial mechanism. Examples of other implicit enabling clauses are to be found in Articles 4(1)(a), 4(2)(c) and (d), 4(8), 7(2), 7(3), 8(2)(g), 8(3), 9(3), 11(3), 11(4), 12(5), 12(6), 12(8), 12(9), 13, 14(2)(b) and 14(7) of the UNFCCC and Articles 2(1)(b), 2(2), 2(3), 3(4), 3(5), 3(9), 3(14), 5(1), 5(2), 5(3), 6(2), 7(3), 7(4), 8(1), 8(2), 8(4), 8(6), 9(1), 12(3)(b), 12(4), 12(5), 12(7), 12(8), 13(4), 13(5), 13(6), 17 and 18 of the Kyoto Protocol. All of these provisions grant the COP the power to decide on the implementation of relevant concepts of the treaty, but not to change these concepts or introduce new obligations⁸⁰¹. In case COP decisions would contain new obligations, the basis of the COP’s power lies only, and vaguely, in Article 7(2)(m) UNFCCC. It is doubtful however whether this article mandates the COP to adopt new substantive obligations for the Parties⁸⁰².

So a COP decision may only be legally-binding if its subject matter falls within an enabling clause granting authority to the COP, and provided the Parties’ intent to be bound by it. The legal status of the outcome of the AWG-LCA, captured in the Cancun Agreements, thus needs to be assessed according to its subject matters. For this research, the question rises whether the Cancun Agreements could create legally-binding obligations in respect of adaptation measures. The requirement by the Bali Action Plan to create the AWG-LCA as a negotiating group clearly relates to the implementation of the UNFCCC, as referred to in Article 7(2) UNFCCC. However, even though mitigation and adaptation are now equal pillars within the UNFCCC regime, at the time of the adoption of the Convention, all eyes were fixed on mitigating global warming (*see above in Section 1.1.2.*). The UNFCCC itself only contains some vague commitments to take measures facilitating

⁸⁰¹ Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 2.

⁸⁰² Climate Action Network (CAN) International, ‘COP Decisions: Binding or Not?’, CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climatenetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 3.

adequate adaptation, and to assist vulnerable developing countries in meeting the costs of adaptation⁸⁰³.

As the Bali Action Plan identified adaptation in 2007 as one of the 5 building blocks for the future 'agreed outcome', the topic increasingly gained attention in the ongoing international climate negotiations. In December 2010, the adoption of the Cancun Adaptation Framework even counted as one of the most important results of COP16. However, none of the UNFCCC provisions on adaptation specifically grants the COP the authority to adopt rules, modalities or principles on adaptation. The establishment of the Cancun Adaptation Framework by a COP decision thus only relies on the general power of the COP granted by Article 7(2), to make the decisions necessary to promote the effective implementation of the Convention. Whether this allows the COP to take binding measures on adaptation, is highly questionable.

However, even when COP decisions lack legally-binding character, they did acquire an important operational and even normative significance in the international climate regime. According to Rajamani, COP decisions have created an institutional compliance architecture in the climate regime, and created a negotiation framework to come to agreed and legally-binding outcome. Furthermore, the language used in COP decisions is often repeated in subsequent legally-binding texts⁸⁰⁴. The COP even has a direct normative influence, as it is allowed to negotiate amendments⁸⁰⁵ and protocols⁸⁰⁶ to agreements, which then need to be ratified by the negotiating Parties. And where the COP develops certain principles, rules or modalities, these provisions, although not legally-binding in a formal sense, are often framed in mandatory language. Political commitments of Parties, captured in a COP decision, are more likely to be met than if they would not have been incorporated in the decision at all⁸⁰⁷. It can even be said that this way, the COP sometimes creates soft law measures. As such, COP decisions have "enriched and expanded the normative core of the regime by fleshing out treaty obligations, reviewing the adequacy of existing obligations, and launching negotiations to adopt further obligations"⁸⁰⁸. It can thus also be concluded that the COP to the UNFCCC has acquired

⁸⁰³ Article 4(1)(b) and (e), and Article 4(4) UNFCCC.

⁸⁰⁴ L. Rajamani, 'Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime', 58 *International and Comparative Law Quarterly* 3, 2009, p. 824-825.

⁸⁰⁵ Article 15 UNFCCC.

⁸⁰⁶ Article 17 UNFCCC.

⁸⁰⁷ Legal Response Initiative, 'COP Decisions: Substance and Mandates', Web paper produced by the Legal Response Initiative, 4 October 2010, available at: <http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 4.

⁸⁰⁸ L. Rajamani, 'Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime', 58 *International and Comparative Law Quarterly* 3, 2009, p. 824-825.

an operational and normative significance as to adaptation-related issues, but cannot create substantive legally-binding obligations on adaptation measures through a COP decision.

2.3.1.4. Lack of consensus on the Cancun Agreements

A final point relating to the nature of the Cancun Agreements which needs to be discussed, is the way the Agreements were adopted. Generally, COP decisions and resolutions are adopted through a consensus of the negotiating Parties. However, in the absence of a consensus, the underlying treaty may require COP decisions to be taken by a majority or super-majority vote. Unlike in formal amendment procedures, explicit consent of a State Party is not required to be bound by a COP decision⁸⁰⁹.

In the international climate regime, the UNFCCC authorizes its COP to adopt, by consensus, rules of procedure for the conduct of its work⁸¹⁰. Under the current (draft) rules of procedure, all COP decisions of substance need to be taken by consensus, except where otherwise expressly provided⁸¹¹. There is however no agreed definition of consensus in the UNFCCC regime. It is generally understood as “the absence of express opposition”⁸¹². This would mean that every state party can block the adoption of a COP decision by expressly objecting to it. For this reason, the Copenhagen Accord was not adopted as a decision by the COP15. Instead, it was only ‘taken note of’ by the COP⁸¹³. There is some discussion however as to whether unanimity is needed to adopt a COP decision by consensus⁸¹⁴. Most scholars argue that consensus-based decision-making does not require full agreement, as abstentions are allowed. Unlike unanimity, consensus is obtained without a vote, and

⁸⁰⁹ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 236, 251.

⁸¹⁰ Article 7(2)(k) UNFCCC.

⁸¹¹ UNFCCC, ‘Adoption of the Rules of Procedure’, Note by the Secretariat, prepared for the Second Session of the Conference of the Parties, held in Geneva from 8-19 July 1996, FCCC/CP/1996/2, 22 May 1996, Rule 42; L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 515.

⁸¹² L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 515.

⁸¹³ Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, Web paper produced by the Legal Response Initiative, 4 October 2010, available at:

<http://www.legalresponseinitiative.org/download/BP25E%20-%20Briefing%20Paper%20-%20COP%20Decisions%20-%20Substance%20and%20Mandates.pdf>, p. 4.

⁸¹⁴ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 251.

is thus “a political rather than a legal concept”⁸¹⁵. This means that objections do not hinder consensus, as long as they are not expressed.

The way the Cancun Agreements were adopted has however provoked some discussion. When the Agreements were presented at the last day of COP16, they immediately gained wide support from the international community, which had hoped for a promising signal after the Copenhagen failure in order to legitimize the existence of the UNFCCC process. However, the Bolivian delegation expressed lengthy objections to the Agreements, arguing that the text was not properly discussed by the Parties. Indeed, the Cancun Agreements were prepared in closed-door Ministerial consultations on secret texts shown by the Mexican Presidency, drawn from non-papers prepared by various facilitators. They had not been negotiated in formal sessions, but Parties were however acquainted with their content⁸¹⁶.

At the last plenary session, the Cancun Agreements were welcomed with a standing ovation. However, due to the express objection of Bolivia, the consensus-based decision-making process of the international climate regime is now under discussion. Even though there are examples of imminent opposition to earlier decisions within the UNFCCC process, there had never been an express objection to an adopted decision before the Cancun summit. The questions thus rises whether this adoption of the Cancun Agreements in the face of an express objection by a State Party has changed the understanding of consensus in the international climate regime. However, as Rajamani describes in glowing terms, “it is unclear what it has been replaced with – a rule of ‘quasi-consensus’, ‘general agreement’, ‘consensus minus one’, or as one negotiator characterised it, ‘terror by applause’”⁸¹⁷.

If consensus can no longer be understood as the absence of express objections, it is not clear how it could then be identified. Some countries argue that the overwhelming applause for the adoption of the Cancun Agreements demonstrated a consensus among the international community. In this sense, consensus would exist by the presence of acclamation, even when express objections exist. Others argue that consensus-based decision-making does not grant a veto right to every negotiating Party. Although further outside the scope of this thesis, I do agree however with Rajamani that acclamation should not be used to overrule express objections of certain, often politically weaker,

⁸¹⁵ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 516.

⁸¹⁶ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 514-515.

⁸¹⁷ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 515-516.

negotiating Parties. The consensus rule serves to give COP decisions greater diplomatic and moral authority, which is sometimes lacking in the UNFCCC regime⁸¹⁸. While a less strict adherence to the consensus rule may simplify negotiations in the international climate regime, it remains crucial to keep this in mind. As the normative influence of COPs in international environmental law is increasing, some questions of legitimacy of international governance become all the more important⁸¹⁹. The existence of an express objection to the adoption of the Cancun Agreements could thus also be held against the legally-binding nature of their content.

2.3.1.5. Customary nature of the Cancun provisions?

Whether or not consensus can still be understood as the absence of express objections, a COP decision adopted by consensus is agreed upon by more states than a decision adopted by a majority vote. Wiersema consequently argues that “some form of instant or emerging customary international law” might be derived from consensus-based COP decisions⁸²⁰. As the Cancun Agreements do not represent a traditional source of public international law as a COP decision, it might indeed be worth discussing whether the content of the Agreements can be considered hard law through the development of customary international law. After all, this traditional source of hard law provides an opportunity to create legally-binding obligations without having to be explicitly consented by all states⁸²¹.

The creation process of customary international law is however difficult to apply to consensus-based COP decisions, as they are tightly connected to the underlying treaty. The meaning of the Parties’ obligations in the Cancun Agreements thus depends on the content of the UNFCCC itself. And although some scholars seem to attach much weight to statements and declarations emanating from international conferences in the creation of customary international law⁸²², it must not be forgotten that next to a strong and clear *opinio iuris*, also state practice is needed. Paragraph 14(f) on

⁸¹⁸ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 516-518.

⁸¹⁹ J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* 1, 2002, p. 10, 33.

⁸²⁰ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 251.

⁸²¹ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 247-248.

⁸²² A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 248.

migration, displacement and planned relocation can only become customary law if states adhere to the invitation to take measures to enhance understanding, coordination and cooperation with regard to climate-induced human mobility, and actually believe themselves to be bound to take these measures. Moreover, the wording of paragraph 14, merely “inviting” states to take action, does not account for much sense of obligation. Finally, it must be kept in mind that it is only the *cumulative* stating of the same principles by numerous non-binding instruments, that can express the *opinio iuris* of the international community⁸²³. As paragraph 14(f) is the first ever mentioning of climate-induced migration in a formal COP decision, we cannot (yet) deduce an *opinio iuris* from this provision.

As for the legal status of the Cancun Agreements themselves, it can thus be concluded that they cannot be regarded as a hard law source of public international law, nor can they be regarded as amounting to customary international law. However, even though they cannot give rise to new stand-alone legal obligations, consensus-based COP decisions can influence Parties’ obligations under the underlying treaty, *in casu* the UNFCCC. They can deepen state obligations by implementing them, through interpretation, or by adding to the text of the underlying treaty. The legally-binding nature of the provisions within the Cancun Agreements depends on the UNFCCC’s enabling clauses. As for measures regarding adaptation, the legally-binding nature of the Cancun provisions is highly questionable, due to the lack of such an enabling clause.

Although the Cancun Agreements do not contain substantive legally-binding provisions on adaptation measures, their political commitments may be important to achieve the hoped-for state conduct. Therefore, the next Chapter explores the mandatory nature of the migration reference within the Cancun Adaptation Framework.

⁸²³ P.-M. Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* 2, 1991, p. 432; International Court of Justice, *Military and Para-Military Activities in and against Nicaragua*, Case of Nicaragua vs. United States of America, Merits, Judgement of 27 June 1986, *ICJ Reports* 1986, p. 14, §§ 188-190.

2.3.2. Exploring the mandatory nature of the human mobility reference

2.3.2.1. Soft, softer, softest?

In order to assess what kind of normative implications can be derived from the mentioning of migration in the adaptation framework, we also need to explore the language of paragraph 14(f) itself. While most ‘soft’ provisions are part of ‘soft’ (*i.e.* non-binding) documents, they can also be included into legally-binding instruments. Therefore, it remains crucial to distinguish between the form and the substance of an instrument. After all, formally non-binding instruments sometimes also contain precisely defined and concrete provisions, imposing certain state behaviour. Such provisions could later be perfectly copied into a treaty⁸²⁴, or act as evidence of *opinio iuris* in the development of international customary law. As Dupuy describes, states often exercise much restraint in negotiating such mandatory provisions in non-binding instruments, as they clearly grant them important political, or even legal, significance. In international environmental law, MEA-based COP decisions often frame certain principles or rules in mandatory language. Even though such provisions are not legally-binding in a formal sense, they can make certain conduct obligatory for the parties, or make access to certain benefits dependent on compliance with those provisions⁸²⁵. It is therefore interesting to discuss whether paragraph 14(f) on climate-induced mobility is formulated in such mandatory language, entailing operational and/or normative consequences for the Parties to the UNFCCC.

On the other hand, even hard law instruments, like treaties, can contain ‘soft’ provisions, that is, if their language is insufficiently clear to hold State Parties to a precise obligation⁸²⁶. Such vague norms and principles in hard law instruments are referred to as ‘legal soft law’, and are increasingly used due to the often difficult compromises to be reached in international negotiations, as well as due to the complexity of the subject matters involved. When clearly determined state obligations cannot be defined without preventing certain governments from ratifying the instrument, states often resort to a more modest phrasing, for example by merely proposing certain guidelines for state conduct, by

⁸²⁴ P.-M. Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* 2, 1991, p. 428-429.

⁸²⁵ J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* 1, 2002, p. 32.

⁸²⁶ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 260.

describing broad goals instead of imposing strict duties, or by inviting states to adopt the required measures at the national level⁸²⁷.

In 2011 at the Durban climate change conference, the Parties to the UNFCCC agreed to launch a negotiation process to adopt “a protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC applicable to all Parties”, as soon as possible, and no later than 2015⁸²⁸ (see *further under Section 3.1.1.*). If the international climate community would succeed to come to such an agreed, legally-binding outcome in the future, it becomes important to assess how the issue of climate-induced mobility should be formulated in a hard law document, in order to bring about the required state obligations. The question whether the current migration provision would in that case amount to a hard law obligation, or merely a ‘legal soft law’ provision, has therefore become relevant.

2.3.2.2. “Inviting” language of paragraph 14(f)

COP decisions vary significantly in the language they use to address state parties, and the intentions they want to articulate. For example, terms such as “shall”, “should” and “must” are more forceful than terms as “urges”, “encourages” and “recommends”. Different types of phrasing thus represent different degrees of political as well as legal obligations. Wiersema even argues that “COP resolutions using terms like ‘shall’ have a harder legal status than those that simply ‘urge’ the parties to act”⁸²⁹. One of the elements in assessing the legal status of consensus-based COP decisions, would then be the level of obligation contained in the language of the COP decision, as this exposes the parties’ intent whether or not to be bound by the decision.

Even though the Cancun Agreements are not legally-binding in a formal sense, they might contain terms which make certain conduct mandatory. The reference to climate-induced migration, which first appeared in the Copenhagen Accord, was at COP16 incorporated in the formal UNFCCC process, albeit with small adjustments. More in general, it must be noted that the text of the Cancun

⁸²⁷ P.-M. Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* 2, 1991, p. 428-430.

⁸²⁸ UNFCCC, Decision 1/CP.17 on the ‘Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, §2-4.

⁸²⁹ A. Wiersema, ‘The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, 2009, p. 253-255.

Agreements, in particular in relation to mitigation measures, represents a shift from a more prescriptive to a more predictive tone⁸³⁰. While the Copenhagen Accord still *committed* Annex I Parties to implement quantified emission reduction targets by 2020⁸³¹, the Cancun Agreements frame this provision in a more predictive tone, *taking note* of quantified emission reduction targets and nationally appropriate mitigation action *to be implemented* by Parties⁸³². However, partly due to its prescriptive wording, the Copenhagen Accord received more resistance, and was therefore only taken note of by the COP, rather than being adopted as a COP decision. ‘Taking note of’ certain provisions or documents is increasingly used by the COP in the UNFCCC regime. While COP15 took note of the entire Copenhagen Accord, COP16 only took note of certain provisions, more specifically of mitigation targets, within the adopted COP decision. Although this formulation represents a certain acknowledgement of the existence of those provisions and documents, it signals political disagreement on the content. Therefore, its legal significance is almost non-existent⁸³³.

Aside from ‘taking note’, COP16 employed various expressions in its AWG-LCA Outcome Decision to address the Parties, going from ‘recognises’, ‘realises’ and ‘confirms’ over ‘affirms’ and ‘requests’ to ‘agrees’ and ‘decides’. As for Part II on ‘Enhanced action on adaptation’, the COP for example *agrees* that enhanced action and international cooperation on adaptation is urgently required⁸³⁴, and *decides* to establish the Cancun Adaptation Framework and the Adaptation Committee. With the inclusion of a specific paragraph on climate-induced migration in the Cancun Adaptation Framework, the COP emphasised the importance of the topic. However, although paragraph 14(f) represents a huge step forward for the issue of climate migration, the COP did not ask for much: paragraph 14(f) merely *invites* states to take measures on climate-induced migration, displacement and planned relocation. ‘Inviting’ states to take action is an even weaker phrasing than other soft law expressions to address State Parties used in the Cancun Agreements, such as ‘encourages’ or ‘urges’. Furthermore, the migration provision left many options open for states to address climate-induced migration, as far as the level of action as well as concerning the type of action to be undertaken⁸³⁵.

⁸³⁰ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 503.

⁸³¹ Copenhagen Accord, paragraph 4.

⁸³² Paragraph 36 and 49 of the Cancun Agreements, AWG-LCA Outcome Decision and paragraph 3 of the Cancun Agreements, Kyoto Outcome Decision.

⁸³³ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 502.

⁸³⁴ Paragraph 11 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁸³⁵ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR,

Together with the placement of the migration paragraph, which treats the issue as a technical matter detached from more contentious issues, the vagueness of paragraph 14(f) clearly helped to keep the topic in the negotiation text at the Cancun conference. Voluntary measures to enhance understanding, coordination and cooperation do not invoke much political disagreement, even on a topic which is so divisive as that of climate-induced migration⁸³⁶. The lack of normative language on this topic within the Cancun Agreements thus served the primary goal, that is: bringing the issue of climate change-induced migration under the attention of international policymakers through the international climate negotiations. However, if future negotiations would deliver a legally-binding, ‘hard’ law agreement, paragraph 14(f), as it is currently phrased, would not lead to more than a legal soft law provision. In order to formally *oblige* states to take measures on climate migration, displacement and relocation, the term “invites” would have to be replaced by hard law terminology.

Nonetheless, it must be pointed out that a status of legal soft law would not be without any legal effect. The soft legal status of for example the principles in Article 3 UNFCCC, indicated by the use of the word ‘should’ throughout the article and introduced by the words “shall be guided”, does not stand in the way of its legal significance. Aside from their relevance for the interpretation and implementation of the UNFCCC, the principles of Article 3 create expectations as to the subject matters of future climate negotiations. Similarly, the inclusion of climate migration in the Cancun Adaptation Framework has created some expectations as to the treatment of the issue in further climate negotiations.

2.3.3. Compliance and enforcement of migration-related provisions in the UNFCCC regime

When discussing the imperative nature of the Cancun Adaptation Framework, we should not only focus on the binding character of COP decisions in a formal legal sense, but also in the sense of being enforceable. Enforcement is after all one of the crucial steps in the implementation of international

Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 12.

⁸³⁶ K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 12.

legal obligations. Without effective compliance and enforcement mechanisms, the development of internationally-agreed obligations to protect our environment may be of little significance⁸³⁷. Particularly the enforcement of international environmental agreements has received a great deal of attention during the past decennia⁸³⁸. As the migration provision within the UNFCCC regime does currently not entail a legally-binding obligation for states, the issue of enforcement seems not (yet) relevant for this research. However, this could change if paragraph 14(f) of the Cancun Adaptation Framework would develop into a legally-binding obligation in the future. Although the topic of enforcement of international climate law is further outside the scope of this thesis, this subchapter briefly describes some of the difficulties in this area.

The main reasons for non-compliance with international environmental law are a lack of capacity, a lack of information, and an unclear internal division of competences⁸³⁹. As for the implementation of a future binding migration-related paragraph, it would for example be necessary to make national authorities aware of the existence of such a provision in the international climate regime, and to create the political momentum for the implementation of some of the recommendations through national and regional migration law and policy. Currently, it seems challenging to convince public opinion into treating migration as an adaptation strategy for environmentally-vulnerable communities, or to create protection regimes for environmentally-displaced persons. Furthermore, policymakers need to be informed on how to implement migration-related provisions of international environmental law, as it is not always clear which laws and migration instruments could be applied. PART III of this research therefore aims to provide policymakers at the national and European level with some policy recommendations on how to account for environmental drivers of migration in their migration legislation.

When states do not comply with their obligations set forth in multilateral environmental agreements, such as the UNFCCC, they might be held responsible for an internationally wrongful act under international law⁸⁴⁰. However, the traditional dispute settlement machinery, as referred to in Article

⁸³⁷ P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 178.

⁸³⁸ See for example A. Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions', 3 *Journal of Environmental Law* 2, 1991; N. Goeteyn and F. Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?', 10 *Chinese Journal of International Law* 4, 2011, p. 791-826.

⁸³⁹ N. Goeteyn and F. Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?', 10 *Chinese Journal of International Law* 4, 2011, p. 798.

⁸⁴⁰ Article 1, International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' in the Report of the International Law Commission on the Work of its 53rd Session, Resolution 56/83 of the UN General Assembly of 12 December 2001, UN Doc. A/56/10.

33 of the UN Charter⁸⁴¹, is not always suited for the enforcement of international environmental law, as it often presupposes the presence of an 'injured state' requesting reparation for a violation of international law, and entails often complex and lengthy international proceedings⁸⁴². In order to ensure compliance with international environmental law, MEAs have therefore created their own compliance mechanisms, next to these traditional dispute settlement procedures⁸⁴³. These mechanisms, including requirements for the provision of information, institutionalised procedures to consider instances of non-compliance, and/or specific dispute settlement procedures, aim to enhance the effectiveness and implementation of the underlying MEA, and apply uniquely to the treaty which created it. They offer a more political solution in case of non-compliance with MEA obligations, and are considered as a way of dispute prevention instead of dispute settlement⁸⁴⁴.

In the UNFCCC regime, the Subsidiary Body for Implementation (SBI) was created by the Convention itself to advise the COP on all matters concerning the Convention's implementation, and to assess the information provided by the Parties, for example on yearly inventories on the emission of greenhouse gases and the storage of these gases in sinks⁸⁴⁵. The catch-all provision of Article 7 UNFCCC has served as the legal basis for the COP to adopt compliance mechanisms⁸⁴⁶. However, COP decisions, even in case they would contain legally-binding provisions, cannot fall under such compliance mechanisms. There seems to be no ground in the UNFCCC itself to justify the adoption of an enforcement mechanism for COP decisions. The COP itself, which legal authority is based on UNFCCC provisions, has no authority to establish a compliance regime to enforce its own decisions⁸⁴⁷. This is in contrast to the Kyoto Protocol, where Article 18 has given the COP/MOP a mandate to

⁸⁴¹ Article 33 of the UN Charter refers to the following means of pacific settlement of disputes: "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

⁸⁴² P. Birnie and A. Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, New York, 2002, p. 178.

⁸⁴³ N. Goeteyn and F. Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?', 10 *Chinese Journal of International Law* 4, 2011, p. 822-825.

⁸⁴⁴ N. Goeteyn and F. Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?', 10 *Chinese Journal of International Law* 4, 2011, p. 825, 796-797.

⁸⁴⁵ Article 10 UNFCCC (Subsidiary Body for Implementation), Article 12 UNFCCC (Communication of Information related to Implementation).

⁸⁴⁶ N. Goeteyn and F. Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?', 10 *Chinese Journal of International Law* 4, 2011, p. 792-793.

⁸⁴⁷ Climate Action Network (CAN) International, 'COP Decisions: Binding or Not?', CAN Ad-Hoc Legal Working Group, 8 June 2009, available at: http://www.climatenetwork.org/sites/default/files/COP_Decisions_CAN_legal_group_June_8_09.pdf, p. 4-5.

adopt a compliance mechanism that can have binding consequences if it is adopted by means of an amendment to the Protocol⁸⁴⁸.

Although the Cancun Adaptation Framework does not contain legally-binding obligations for states to take specific adaptation measures, COP16 established the Adaptation Committee with the aim of promoting “the implementation of enhanced action on adaptation in a coherent manner”⁸⁴⁹. With this goal in mind, the Committee can: (a) provide technical support and guidance to the Parties, (b) strengthen, consolidate and enhance the sharing of relevant information, knowledge, experience and good practices at various policy levels, (c) promote synergy and strengthen engagement with national, regional and international organisations, centres and networks, (d) provide information and recommendations, drawing on adaptation good practices, for consideration by the COP when providing guidance on means to incentivize the implementation of adaptation actions, and (e) consider information communicated by Parties on their monitoring and review of adaptation actions, support provided and received, possible needs and gaps and other relevant information⁸⁵⁰.

Coming back to climate-induced migration, the Adaptation Committee could thus play an important role in the implementation of some of the measures contained in paragraph 14(f) of the Cancun Adaptation Framework. The Committee could take up the task of providing the COP as well as individual states with policy recommendations on how to undertake measures to enhance understanding, coordination and cooperation with regard to various types of climate-induced human mobility. In particular paragraph 20(d) enables the Adaptation Committee to formulate recommendations on good practices, for example on migration programmes which have been used to reduce the vulnerability of affected communities. According to Warner, the Adaptation Committee could also provide technical advice on possible adaptation activities related to migration, displacement and planned relocation. However, it does not have a direct decision-making power over climate funding⁸⁵¹.

It can be recommended to further elaborate such ‘soft compliance mechanisms’, in particular when there are no hard law obligations in sight for the near future. However, the implementation of the measures outlined in paragraph 14(f) of the Cancun Adaptation Framework cannot only be achieved

⁸⁴⁸ Article 18 of the Kyoto Protocol.

⁸⁴⁹ Paragraph 20 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁸⁵⁰ Paragraph 20 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁸⁵¹ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25.

through the UNFCCC regime. Most measures related to climate-induced human mobility will need to be implemented through national and/or regional migration law and policy (*see PART III of this thesis*). The UNFCCC process has a more “catalytic role”, and could provide Parties with mechanisms to help coordinate and support their activities related to climate-induced migration, such as adaptation funding and the SBI Work Programme on Loss and Damage⁸⁵². Furthermore, urgent adaptation needs related to climate migration could be identified through National Adaptation Programmes of Action (NAPAs). The next Chapter will delve further into some of these supporting implementation mechanisms.

2.4. Implementation of migration-related provisions through the UNFCCC Adaptation Framework

The inclusion of human mobility in the Cancun Adaptation Framework represents a milestone for the issue of environment-induced migration, as it is the first ever mentioning of migration in an agreed COP outcome⁸⁵³. Although paragraph 14(f) is not legally-binding, it could have important replications, as it is situated in an important part of the Adaptation Framework. In order to prepare our adaptation strategies to deal with an increase in human mobility as people seek to respond to a degrading climate, it is necessary to discuss how to translate paragraph 14(f) into concrete adaptation actions on the ground. In other words, how can the migration-related measures contained in paragraph 14(f) be implemented? This Section analyses how to put words into action through the UNFCCC Adaptation Framework.

Even though the measures contained in paragraph 14(f) need to be implemented through migration law and policy, the UNFCCC adaptation framework itself offers some tools to enhance the efficient implementation of adaptation action. In particular the issue of adaptation funding has received a lot

⁸⁵² K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 13.

⁸⁵³ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 4.

of attention in the debate on climate-induced migration, as well as the incorporation of climate-induced human mobility into National Adaptation Programmes of Action (NAPAs). Furthermore, as discussed above, adaptation could be supported through technology and capacity-building under the Subsidiary Body for Implementation (SBI) and the Adaptation Committee. In addition, risk assessments could help to identify vulnerable communities for participation in programmes for adaptive migration. Affected states could be assisted in developing such risk assessments by international and national institutions, and adaptation funding could be allocated for such assessments.

2.4.1. Implementing adaptation at the national level

2.4.1.1. National Adaptation Programmes of Action (NAPAs)

A. Identifying urgent adaptation needs

One way of implementing paragraph 14(f) is to incorporate climate-related migration into the broader adaptation framework via National Adaptation Programmes of Action (NAPAs). COP 7 in Marrakech in 2001 has introduced NAPAs to help the LDCs, which will suffer disproportionately from the adverse effects of climate change, to design immediate adaptation plans. These programmes provide the main mechanism for those countries to identify their most urgent adaptation needs and priority actions⁸⁵⁴.

Through the NAPAs, the LDCs can respond to their most imminent adaptation needs, for which further delay would increase their vulnerability and/or financial costs. NAPAs generally contain background information on the country concerned, an assessment of the LDC's vulnerabilities to climate change, potential barriers to the implementation of adaptation activities, and a list of

⁸⁵⁴ Global Forum on Migration and Development (GFMD), Mexico Chair 2010, Background Paper for Roundtable Session 3.2, 'Assessing the Relevance and Impact of Climate Change on Migration and Development', 15 September 2010; S. Martin, 'Managing Environmentally Induced Migration', in F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration (IOM), Geneva, 2009, p. 361; S. Martin, 'Climate Change, Migration and Governance', 16 *Global Governance on Migration* 3, July-September 2010, p. 401.

proposed adaptation projects⁸⁵⁵. These adaptation strategies are defined at the national and community level, and typically include projects related to early-warning systems, disaster risk reduction, improving food security and water resource management. As of December 2011, 47 countries have submitted NAPAs to the UNFCCC Secretariat⁸⁵⁶. In order to implement all of these NAPAs, financial support from the international community is crucial. For example the Least Developed Countries Fund (LDCF) therefore finances the preparation and implementation of NAPAs (*see further below in Section 2.4.2.*).

B. Mainstreaming human mobility in the NAPAs

The ways in which NAPAs address migration, displacement and planned relocation say a lot about how states view climate-related human mobility. While some countries profoundly discuss the issue in their NAPAs, others address climate-related migration only remotely⁸⁵⁷. A recent Report issued by the University of Sussex has shown that a variety of types of movement is represented in the NAPAs: out of the 45 NAPAs reviewed, 13 refer to rural out-migration, 9 to pastoralist migration between two locations, and 14 to climate-induced resettlement and displacement. However, most NAPAs treat migration as a negative consequence of global warming, or even as an obstacle for successful adaptation⁸⁵⁸. Consequently, the majority of proposed policy measures are aimed at limiting, or even stopping, migration flows, in particular when it concerns rural out-migration.

⁸⁵⁵ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 8.

⁸⁵⁶ For a list of NAPAs and a last update, see:

http://unfccc.int/cooperation_support/least_developed_countries_portal/submitted_napas/items/4585.php

⁸⁵⁷ Global Forum on Migration and Development (GFMD), Mexico Chair 2010, Background Paper for Roundtable Session 3.2, 'Assessing the Relevance and Impact of Climate Change on Migration and Development', 15 September 2010; S. Martin, 'Managing Environmentally Induced Migration', in F. Laczko and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration (IOM), Geneva, 2009, p. 361-367; J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf.

⁸⁵⁸ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at:

Human mobility appears to be most thoroughly addressed in the NAPAs of African countries, while almost half of the reviewed NAPAs contain little consideration of the issue⁸⁵⁹. In particular for countries such as Bangladesh, Cambodia and Nepal, this lack of attention is remarkable, as these countries are severely confronted with climate-induced migration, displacement and relocation. Clearly, the variability in the extent to which migration is discussed in NAPAs does not correspond to the relative importance of climate-induced migration in these countries. The Report furthermore describes how NAPAs overwhelmingly focus on internal migration, mostly neglecting cross-border movement⁸⁶⁰. Only Mali's NAPA explicitly links drought to international migration, referring to high rates of emigration to West Africa's coastal countries and to European countries⁸⁶¹.

From the NAPAs with a substantial discussion on migration (*i.e.* containing 20 or more references to the issue), the majority was predominantly concerned with internal migration as an adaptive response to drought, focusing in particular on seasonal and rural-urban migration of farmers and herders⁸⁶². The dominant perspective in these NAPAs was however a rather negative view on these migration flows. Chad's NAPA for example views climate-related movement as leading to competition over the best land⁸⁶³, while the NAPA of Mauritania links migration to the spread of

http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf; H. Smith, 'Migration: A Vital Component of Individual and Collective Strategies to Combat Climate Change? Not under Current NAPA Priorities', UK Climate Change and Migration Coalition, Blog Post of 30 March 2012, available at: <http://climatemigration.org.uk/Migration-Will-Be-a-Vital-Component-of-Individual-and-Collective-Strategies-to-Combat-Climate-Change-Not-under-Current-Napa-Priorities/>.

⁸⁵⁹ H. Smith, 'Migration: A Vital Component of Individual and Collective Strategies to Combat Climate Change? Not under Current NAPA Priorities', UK Climate Change and Migration Coalition, Blog Post of 30 March 2012, available at: <http://climatemigration.org.uk/Migration-Will-Be-a-Vital-Component-of-Individual-and-Collective-Strategies-to-Combat-Climate-Change-Not-under-Current-Napa-Priorities/>.

⁸⁶⁰ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 14, 20.

⁸⁶¹ National Adaptation Programme of Action (NAPA) of Mali, July 2007, available at: <http://unfccc.int/resource/docs/napa/mli01f.pdf>, p. 34.

⁸⁶² J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 15-16.

⁸⁶³ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 16-17; National Adaptation Programme of Action (NAPA) of Chad, February 2010, available at: <http://unfccc.int/Resource/Docs/napa/tcd01.pdf>, p. 27.

contagious diseases and the formation of disorderly suburban settlements⁸⁶⁴. According to Togo's NAPA, migration of farmers to new lands leads to deforestation, sanitation and higher rates of unemployment⁸⁶⁵. Consequently, these countries proposed adaptation priority projects that seek to limit or halt climate-induced migration flows, as they see migration as a threat to other proposed priority projects. Sudan's NAPA for example aims to stop rural out-migration by reviving gum Arabic trees and by introducing water harvesting methods in rural areas⁸⁶⁶, while Mali seeks to achieve this through the establishment of fish-raising practices in rural areas, and using meteorological forecasts to assist in agricultural production⁸⁶⁷. Although these proposed measures are noble and necessary, it is important to point out that attempts to limit migration have in the past repeatedly proven to fail, and ignore the fact that migration can also positively contribute to the adaptation of vulnerable communities. According to Sward and Codjoe, efforts to halt rural out-migration may even render the population more vulnerable to climate shocks⁸⁶⁸.

On the other hand, countries such as the Solomon Islands, Sao Tome and Principe, Kiribati and Vanuatu primarily focus on the resettlement and displacement of vulnerable low-lying communities in their NAPAs, caused by, *inter alia*, sea level rise and coastal erosion. In their list of priority adaptation projects, they propose for example projects aimed at relocating communities at risk from flooding⁸⁶⁹. Also seven continental African countries address resettlement and displacement, viewing

⁸⁶⁴ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 17; National Adaptation Programme of Action (NAPA) of Mauritania, November 2004, available at: <http://unfccc.int/resource/docs/napa/mau01e.pdf>, p. 13, 70.

⁸⁶⁵ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf; National Adaptation Programme of Action (NAPA) of Togo, September 2009, available at: <http://unfccc.int/resource/docs/napa/tgo01f.pdf>, p. 19, 64.

⁸⁶⁶ National Adaptation Programme of Action (NAPA) of Sudan, July 2007, available at: National Adaptation Programme of Action (NAPA), p. 43, 45.

⁸⁶⁷ National Adaptation Programme of Action (NAPA) of Mali, July 2007, available at: <http://unfccc.int/resource/docs/napa/mli01f.pdf>, p. 53, 57.

⁸⁶⁸ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 24.

⁸⁶⁹ National Adaptation Programme of Action (NAPA) of Sao Tome and Principe, November 2007, available at: <http://unfccc.int/resource/docs/napa/stp01.pdf>, p. 21-22, 24, 34.

resettlement as an important adaptation strategy for vulnerable communities, or proposing measures to avoid future population displacement⁸⁷⁰.

While many countries do refer to climate-related movement in their NAPAs, they are less clear on the incorporation of the issue into their list of proposed priority adaptation actions. 13 NAPAs do not even include any reference to migration, displacement or relocation in their priority projects⁸⁷¹. Even though it is widely acknowledged that migration should not only be regarded as a failure to adapt to a changing environment, the majority of NAPAs does not recognise migration as a proactive adaptation and development strategy, and focuses instead on the negative impacts of migration in receiving regions⁸⁷². Few adaptation strategies focus on migration as an explicit adaptation measure, either to help preserve fragile ecosystems by reducing population pressure, or to protect communities from the effects of sudden natural disasters or slow-onset environmental degradation. However, as migration, ranging from seasonal pastoralist migration to international labour migration, can act as a crucial adaptation strategy, it is time for NAPAs to recognise migration as an important livelihood strategy in the face of a changing climate.

C. Limitations of NAPAs to support adaptive migration

There are however some limitations which need to be taken into account when promoting NAPAs as a mechanism to implement paragraph 14(f) of the Cancun Agreements into wider adaptation policies. Although the population of the LDCs is undeniably the most severely affected by the adverse effects of climate change, climate-related migration seems not (yet) to be a priority adaptation

⁸⁷⁰ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 27. These African countries include, *inter alia*, Uganda, Tanzania, Gambia, Togo and Rwanda.

⁸⁷¹ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 21-22.

⁸⁷² J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 8.

concern for their governments. Thus, governments need to be better informed on why and how to introduce migration-related measures into their adaptation plans.

Furthermore, the 2007/2008 UNDP Human Development Report showed that NAPAs often fail to integrate adaptation policies into wider policies on development, as they are generally developed outside of the institutional framework for poverty reduction⁸⁷³. This disharmony between adaptation and development policies is illustrated by the lack of attention which the NAPAs of for example Bangladesh and Nepal pay to the issue of climate-related migration, while their Poverty Reduction Strategy Papers (PRSPs) and Decent Work Country Programmes (DWCPs) do discuss the issue more thoroughly⁸⁷⁴.

In addition, NAPAs have been criticised for focusing on “climate-proofing through small-scale projects”, ignoring a diversity of factors rendering a certain community vulnerable to the adverse effects of climate change⁸⁷⁵. Very often, the development and implementation of NAPAs is undertaken without consulting the most vulnerable communities⁸⁷⁶. Nonetheless, NAPAs remain pivotal planning instruments to help the LDCs to adapt to a changing climate, and to prepare for climate-related migration, displacement and relocation⁸⁷⁷. So notwithstanding the above described shortcomings, some recommendations can be formulated to better include the issue of climate-induced human mobility into the LDCs’ NAPAs.

⁸⁷³ United Nations Development Programme (UNDP), *Human Development Report 2007/2008: ‘Fighting Climate Change: Human Solidarity in a Divided World’*, Palgrave Macmillan, New York, 2007, available at: http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf, Chapter 4, ‘Adapting to the Inevitable: National Action and International Cooperation’, p. 188.

⁸⁷⁴ J. Sward and S. Codjoe, ‘Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)’, Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 20.

⁸⁷⁵ United Nations Development Programme (UNDP), *Human Development Report 2007/2008: ‘Fighting Climate Change: Human Solidarity in a Divided World’*, Palgrave Macmillan, New York, 2007, available at: http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf, Chapter 4, ‘Adapting to the Inevitable: National Action and International Cooperation’, p. 188.

⁸⁷⁶ J. Sward and S. Codjoe, ‘Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)’, Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 9.

⁸⁷⁷ S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 401.

D. Recommendations to account for human mobility in the NAPAs

There is clearly some room for improvement in the NAPAs' treatment of migration into their proposed adaptation actions. In order to create a coherent policy approach, a more systematic integration of migration into the NAPAs is advisable. The national adaptation framework must furthermore be integrated with broader policies of development and poverty reduction⁸⁷⁸. By consulting vulnerable communities, governments could better identify priority actions to respond to their most urgent adaptation needs⁸⁷⁹. According to Sward and Codjoe, a livelihood-based approach, focusing on the vulnerability of rural livelihood support systems, would ensure that the NAPAs benefit vulnerable groups, including migrants⁸⁸⁰.

As for the inclusion of human mobility in the NAPAs, it can be recommended to acknowledge the positive role which migration can play in the adaptation process of vulnerable communities, by explicitly including this type of climate-related movement in the list of priority adaptation actions, where appropriate. Particularly in the LDCs, people are often faced with financial, social and/or cultural barriers to migrate, leaving them "trapped" in a destructed environment. So instead of trying to halt climate-induced migration flows, NAPAs could focus on how to support migration as an important livelihood strategy for vulnerable communities⁸⁸¹.

It is clear that NAPAs can play a crucial role in the development and implementation of adaptation plans in the LDCs. In addition, they can also launch wider adaptation processes in other developing

⁸⁷⁸ Global Forum on Migration and Development (GFMD), Mexico Chair 2010, Background Paper for Roundtable Session 3.2, 'Assessing the Relevance and Impact of Climate Change on Migration and Development', 15 September 2010; S. Martin, 'Managing Environmentally Induced Migration', in F. Laczo and C. Aghazarm (eds.), *Migration, Environment and Climate Change: Assessing the Evidence*, International Organisation for Migration (IOM), Geneva, 2009, p. 362.

⁸⁷⁹ International Organisation for Migration (IOM), 'Disaster risk reduction, climate change adaptation and environmental migration: A Policy Perspective', Geneva, 2010, available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/DRR-CCA-Policy-Paper-Final.pdf, p. 10.

⁸⁸⁰ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 31.

⁸⁸¹ J. Sward and S. Codjoe, 'Human mobility and climate change adaptation policy: a review of migration in national adaptation programmes of action (NAPAs)', Migrating out of Poverty, Research Programme Consortium, Working Paper 6, March 2012, available at: http://www.dfid.gov.uk/r4d/PDF/Outputs/MigratingOutOfPov/WP6_Human_Mobility_and_Climate_Change_Adaptation_Policy.pdf, p. 6, 31.

countries, as this kind of strategic policy planning could be expanded to other countries⁸⁸². For the implementation of paragraph 14(f) of the Cancun Adaptation Framework, NAPAs are equally important, among others because they raise awareness on urgent adaptation needs, and highlight measures which require adaptation funding⁸⁸³. As the topic of climate-induced migration is now increasingly incorporated into the international climate change framework, it is time to implement migration-related adaptation measures on the ground.

2.4.1.2. National Adaptation Plans (NAPs)

At COP16 in Cancun, Parties also decided to create a new adaptation process to enable the LDCs to formulate and implement National Adaptation Plans (NAPs). The NAP process was established with the aim of reducing vulnerability to the impacts of climate change, by building adaptive capacity and resilience, and facilitating the integration of climate change adaptation into new and existing policies, programmes and activities⁸⁸⁴.

The SBI, which was requested by Parties to start the discussion on NAPs under the Cancun Adaptation Framework, set up a process to consider NAPs at COP17, by inviting Parties and relevant organisations to submit their views on NAPs to the secretariat. An expert meeting was held in September 2011, in order to identify elements to enable the LDCs to formulate and implement NAPs⁸⁸⁵. In identifying medium- and long-term adaptation needs, and developing and implementing strategies to address those needs, policymakers could build upon their experience and learn from the successes and failures of the NAPA process as they move into the next phase of their climate change adaptation strategy.

⁸⁸² International Organisation for Migration (IOM), 'Disaster risk reduction, climate change adaptation and environmental migration: A Policy Perspective', Geneva, 2010, available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/DRR-CCA-Policy-Paper-Final.pdf, p. 10.

⁸⁸³ H. Smith, 'Migration: A Vital Component of Individual and Collective Strategies to Combat Climate Change? Not under Current NAPA Priorities', UK Climate Change and Migration Coalition, Blog Post of 30 March 2012, available at: <http://climatemigration.org.uk/Migration-Will-Be-a-Vital-Component-of-Individual-and-Collective-Strategies-to-Combat-Climate-Change-Not-under-Current-Napa-Priorities/>.

⁸⁸⁴ UNFCCC, Decision 5/CP.17 on 'National Adaptation Plans', adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 1.

⁸⁸⁵ UNFCCC, Report on the Expert Meeting on the Process and the Modalities and Guidelines for the Formulation and Implementation of National Adaptation Plans, Note by the Secretariat, Subsidiary Body for Implementation at its Thirty-Fifth Session, held in Durban from 28 November to 3 December 2011, FCCC/SBI/2011/12, 10 November 2011.

At COP17 in Durban, which was held together with the 35th meeting of the Subsidiary Body for Implementation (SBI), Parties adopted Decision 5/CP.17 on the NAPs⁸⁸⁶. This decision includes initial guidelines for the formulation of NAPs by LCDs⁸⁸⁷, and elaborates on elements for the preparatory and implementation phases, as well as for reporting, monitoring and evaluation⁸⁸⁸. The Least Developed Countries Expert Group (LEG) was mandated to provide technical guidance and support, with contributions from the Adaptation Committee⁸⁸⁹. Other, non-LDC, developing countries, were also invited to use NAPs according to their national circumstances⁸⁹⁰, while developed country Parties were requested to provide the necessary finance, technology and capacity-building for the NAP process in accordance with the Cancun Agreements⁸⁹¹. The Global Environmental Facility (GEF) was requested, through the Least Developed Countries Fund (LDCF) (*see further below in Section 2.4.2.*), to consider how to support the preparation of the NAP process, while maintaining the LDC work programme, including the NAPAs⁸⁹².

At this point in time, it is difficult to draw any conclusions on the inclusion of climate-induced human mobility into this NAP process. The IOM responded to the invitation to support the NAP process in LDCs, noting “that adaptation planning should factor in human mobility considerations given the growing impact of climate change on livelihoods and human mobility”⁸⁹³. The IOM furthermore referred to the growing importance of including specialised organisations in the NAP process, explaining how the organisation could offer support related to the various forms of climate-induced

⁸⁸⁶ UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012.

⁸⁸⁷ UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 5-11.

⁸⁸⁸ UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, Annex.

⁸⁸⁹ UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 13-17.

⁸⁹⁰ UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 28-31.

⁸⁹¹ UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 21.

⁸⁹² UNFCCC, Decision 5/CP.17 on ‘National Adaptation Plans’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 22.

⁸⁹³ UNFCCC, Synthesis Report on the Support for the National Adaptation Plan Process for the Least Developed Countries, Note by the Secretariat, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, FCCC/SBI/2012/8, 30 April 2012, § 41.

human mobility, humanitarian preparedness and livelihood stabilization programmes for environmentally-vulnerable communities, *i.a.* through research, policy dialogue, capacity-building, advocacy and operational activities⁸⁹⁴. According to the IOM, NAPs should “give priority to the particular needs of those most vulnerable to and affected by climate change”, including not only those on the move or at risk of displacement for environmental reasons, but also those which are “trapped” in dangerous or unsustainable environments due to a lack of resources to move away. They should furthermore take action to minimise displacement as a humanitarian consequence of climate change, and include inclusive and direct consultations with affected populations in the strategic planning. Finally, the IOM recommends to make migration work for adaptation, acknowledging the positive role which human mobility could play in adaptation processes at the earlier stages of environmental degradation, linking migration management for example with sustainable development policy strategies⁸⁹⁵.

The World Bank also called for proper attention to the social dimensions of climate variability and change, including “innovation in areas not commonly considered as relevant to building climate resilience such as social protection, migration and population resettlement”⁸⁹⁶. In my opinion, a systematic integration of migration into the NAPs is required, similar as is recommended above for the NAPAs. And it is equally important to recognise migration as a positive adaptation strategy in national adaptation processes.

At its thirty-sixth session in May 2012, the SBI considered guidance on policies and programmes to support the NAP process, based on the submissions by various Parties and organisations. A draft decision was adopted, to be considered at COP18 in Doha in December 2012⁸⁹⁷. Eventually, the COP

⁸⁹⁴ UNFCCC, Synthesis Report on the Support for the National Adaptation Plan Process for the Least Developed Countries, Note by the Secretariat, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, FCCC/SBI/2012/8, 30 April 2012, § 41; International Organisation for Migration (IOM), Submission to the UNFCCC concerning Draft Decisions 23 and 24 of -/CP.17 of the National Adaptation Plans (NAPs), Information on Support to the National Adaptation Plan Process in the Least Developed Countries, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, 12 April 2012, p. 15, 17.

⁸⁹⁵ International Organisation for Migration (IOM), Submission to the UNFCCC concerning Draft Decisions 23 and 24 of -/CP.17 of the National Adaptation Plans (NAPs), Information on Support to the National Adaptation Plan Process in the Least Developed Countries, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, 12 April 2012, p. 16-18.

⁸⁹⁶ UNFCCC, Submission from the World Bank to Decision 5/CP.17 on National Adaptation Plans, Information on How Organizations and Agencies Have Responded to the Invitation to Support the National Adaptation Plan Process in the Least Developed Countries and Consider Establishing Support Programmes, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, 12 April 2012, p. 12.

⁸⁹⁷ UNFCCC, Report of the Subsidiary Body for Implementation on its Thirty-Sixth Session, held in Bonn from 14 to 25 May 2012, Addendum: ‘Draft Texts under Consideration by the Conference of the Parties and by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol’, FCCC/SBI/2012/15/Add.2, 6 July 2012, p. 18-21.

adopted Decision 12/CP.18 on National Adaptation Plans⁸⁹⁸. However, migration, displacement nor planned relocation were mentioned in this decision. It thus remains to be seen if and how human mobility will be incorporated into the NAP process. One way to reach this goal, would for example be to develop risk assessments of sudden-onset natural hazards and develop preparedness measures to prevent and manage disaster-induced displacement, *i.a.* through early warning systems and contingency planning⁸⁹⁹.

Clearly, the NAP process has the potential to provide a strong and long-term country-driven strategic framework to prepare and implement climate change adaptation strategies. Whether or not these expectations will be fulfilled, will depend *i.a.* on the way Parties learn from their experiences with NAPAs, as well as on the integration of NAPs into the broader UNFCCC adaptation framework. I believe mainstreaming human mobility into national adaptation planning is part of such a comprehensive framework for adaptation planning. For the future, further research on countries' progress in formulating and implementing NAPs, including the integration of climate-induced migration, is advisable.

2.4.2. Adaptation funding

As discussed above, paragraphs 13 and 14 of the Cancun Adaptation Framework provide a list of activities that can be considered 'adaptive', and might qualify for adaptation funding in the future⁹⁰⁰. The fact that funding might be available for migration within the UNFCCC framework, is one of the most important differences between this and other international fora addressing human mobility.

⁸⁹⁸ UNFCCC, Decision 12/CP.18 on 'National Adaptation Plans', adopted at the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012, FCCC/CP/2012/8/Add.2, 28 February 2013.

⁸⁹⁹ International Organisation for Migration (IOM), Submission to the UNFCCC concerning Draft Decisions 23 and 24 of -/CP.17 of the National Adaptation Plans (NAPs), Information on Support to the National Adaptation Plan Process in the Least Developed Countries, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, 12 April 2012, p. 17.

⁹⁰⁰ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 4; K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 13.

2.4.2.1. The emerging climate finance system

In order to support states in planning and implementing the necessary adaptation measures to prepare for the adverse effects of climate change, sufficient and sustained financing is needed. In particular developing countries require financial assistance to develop national adaptation plans at the local, sub-national and national level. The UNFCCC states that developed country Parties “shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects”⁹⁰¹. However, this provision indicates neither how this financing should be organised, nor which adaptation actions are eligible for funding. As, at the time of the adoption of this text, migration was not yet accepted as part of adaptation action, it is for example not clear whether Article 4(4) also refers to the costs of climate-related migration, displacement and planned relocation.

To facilitate financial support for adaptation, the UNFCCC regime has established its own financial system. Based on Article 11 UNFCCC, this financial mechanism is accountable to the COP, which decides on its policies, programme priorities and eligibility criteria. The operation of the mechanism is entrusted to one or more existing international entities⁹⁰². Currently, the operation of the mechanism is partly entrusted to the Global Environment Facility (GEF) and the Adaptation Fund Board (AFB). In order to help countries to adapt, the GEF supports projects reducing countries’ vulnerability to climate change impacts, and helps them to increase their adaptive capacity. The GEF also operates as a financial mechanism for other key environmental conventions, such as the Biodiversity Convention, the Convention on Persistent Organic Pollutants, and the UN Convention to Combat Desertification⁹⁰³. In 2001, the GEF received the mandate to finance concrete adaptation projects on the ground⁹⁰⁴. By March 2012, the GEF had already mobilized more than 430 million USD, financing concrete adaptation action in more than 135 projects covering over 90 developing

⁹⁰¹ Article 4(4) UNFCCC.

⁹⁰² Article 11(1) UNFCCC.

⁹⁰³ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, ‘Global Environment Facility, Financing Adaptation Action’, Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 6.

⁹⁰⁴ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, ‘Global Environment Facility, Financing Adaptation Action’, Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 9.

countries and economies in transition⁹⁰⁵. As climate change clearly impacts on development, the GEF aims to integrate adaptation action into development policy⁹⁰⁶.

As the financial mechanism of the UNFCCC, the GEF finances concrete adaptation actions through three independent, yet complementary trust funds: the Special Climate Change Fund (SCCF), the Least Developed Countries Fund (LDCF), and the Strategic Priority on Adaptation (SPA) under the GEF Trust Fund. Furthermore, the Parties to the UNFCCC have established the Green Climate Fund (GCF) under the Convention, and the Adaptation Fund (AF) under the Kyoto Protocol. Finally, financial support can also be made available through bilateral, regional and other multilateral channels⁹⁰⁷. Within the limits of this research, I will further focus on some of the funding options which are available in the UNFCCC regime itself.

- *Special Climate Change Fund (SCCF)*

The Special Climate Change Fund (SCCF) operates since 2001 under the Convention itself, and is managed by the GEF. It addresses the special needs of developing countries, by supporting activities related to: (a) adaptation, (b) technology transfer, (c) energy, transport, industry agriculture, forestry, and waste management, and (d) economic diversification. Adaptation activities to address the adverse impacts of climate change are eligible for funding under the SCCF as a top priority⁹⁰⁸.

- *Least Developed Countries Fund (LDCF)*

The Least Developed Countries Fund (LDCF) was established to address the extreme vulnerability and limited adaptive capacity of the Least Developed Countries (LDCs), and is managed by the GEF. As a priority, the Fund supports the preparation and implementation of NAPAs, which identify LDC's urgent adaptation needs, and contain a list of prioritised projects to be implemented with financial

⁹⁰⁵ Global Environment Facility (GEF), 'Behind the Numbers. A Closer Look at GEF Achievements', March 2012, available at: http://www.thegef.org/gef/sites/thegef.org/files/publication/gef_numbers_10.08.10-CRA-small.pdf, p. 6.

⁹⁰⁶ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 9.

⁹⁰⁷ Article 11(5) UNFCCC.

⁹⁰⁸ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 18.

aid from the LDCF⁹⁰⁹. At COP17 in Durban, Parties also appointed the LDCF to support the new NAP process⁹¹⁰.

As of December 2011, the LDCF has financially supported NAPAs in 48 LDCs. As those most vulnerable countries of the world have made some progress in building their resilience to climate change, they can now share their adaptation experience with the rest of the world⁹¹¹.

- *Strategic Priority on Adaptation (SPA)*

The Strategic Priority on Adaptation (SPA) was created in 2001 as part of the GEF Trust Fund, in order to reduce vulnerability and build adaptive capacity in the GEF's focal areas. It was intended to support pilot and demonstration projects addressing local adaption needs. Unlike the SCCF and the LDCF, the SPA only finances projects with global environmental benefits. The SPA was an innovative initiative, because until that time multilateral and bilateral organisations had mainly focused on research, assessments, and screening tools, rather than on-the-ground adaptation interventions. Through SPA funding, the GEF has supported the first concrete adaptation projects, implementing measures to reduce vulnerability and build adaptive capacity of vulnerable communities⁹¹².

- *Adaptation Fund (AF)*

The Adaptation Fund (AF) was established in order to fund concrete adaptation projects and programmes in developing countries that are Parties to the Kyoto Protocol, and are particularly vulnerable to the adverse effects of climate change. It is managed by the Adaptation Fund Board (AFB), with secretariat services from the GEF, and the World Bank serving as the trustee⁹¹³.

⁹⁰⁹ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 13.

⁹¹⁰ UNFCCC, Decision 5/CP.17 on 'National Adaptation Plans', adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 22.

⁹¹¹ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 13.

⁹¹² B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 7, 11.

⁹¹³ UNFCCC, Adaptation Fund Board, 'Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund, available at:

Adaptation projects are a set of activities aimed at addressing the adverse impacts of and risks posed by climate change, which can be implemented at the community, national, and transboundary level. Adaptation programmes on the other hand, consist of processes, plans, or approaches for addressing climate change impacts that are broader than the scope of an individual project⁹¹⁴. Adaptation projects and programmes in developing countries are eligible for funding under the AF when they are country driven and based on the needs, views and priorities of the developing country, with the explicit aim of adapting and increasing climate resilience. They should furthermore take into account, *inter alia*, national sustainable development strategies, poverty reduction strategies and national adaptation programmes of action⁹¹⁵.

- *Fast-track financing*

While COP15 was generally regarded as a failure, some important steps were taken in Copenhagen. For example on the issue of financing, the Copenhagen Accord contained a commitment by industrialised countries to provide “scaled up, new and additional, predictable and adequate funding” of 30 billion USD by 2012, allocated between adaptation and mitigation⁹¹⁶. The most vulnerable developing states, such as the LDCs, small-island developing states and African countries, were given priority for adaptation programmes⁹¹⁷. Developed countries furthermore committed themselves to supplement this fast start financing by mobilizing jointly USD 100 billion USD per year from 2020 onwards, to address the needs of developing countries.

http://unfccc.int/files/adaptation/implementing_adaptation/adaptation_funding_interface/application/pdf/afbguide.pdf, p. 3.

⁹¹⁴ UNFCCC, Adaptation Fund Board, ‘Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund, available at:

http://unfccc.int/files/adaptation/implementing_adaptation/adaptation_funding_interface/application/pdf/afbguide.pdf, p. 4.

⁹¹⁵ UNFCCC, Adaptation Fund Board, ‘Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund, available at:

http://unfccc.int/files/adaptation/implementing_adaptation/adaptation_funding_interface/application/pdf/afbguide.pdf, p. 15.

⁹¹⁶ Copenhagen Accord, Paragraph 8.

⁹¹⁷ S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 401-402; K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 14; K. Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’, Paper prepared for the UNHCR’s Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 10.

- *Green Climate Fund*

At COP16 in Cancun, the fast-track financing mechanism agreed upon in Copenhagen was secured within the Cancun Agreements⁹¹⁸. Parties also decided to establish the Green Climate Fund as an operating entity of the financial mechanism of the UNFCCC under Article 11, in order to support projects, programmes, policies and other activities in developing countries using thematic funding windows⁹¹⁹. The Parties decided that a significant share of new multilateral funding for adaptation should flow through this Green Climate Fund⁹²⁰. At COP17 held in Durban, the COP adopted Decision 3/CP.17, in which Parties agreed on institutional matters for the functioning of the Green Climate Fund⁹²¹.

Developed country Parties agreed to jointly mobilize 100 billion USD per year from 2020 onwards, to address the needs of developing countries. However, it is not yet clear how this commitment will be divided among developed country Parties, neither who is entitled to receive such funding, that is: who is the most vulnerable. As for climate-induced migration, it is unclear for example whether a Pacific island nation, losing all of its territory, is more vulnerable than countries such as Bangladesh, losing only a part of their territory, but dealing with much more millions of climate-induced displaced persons within their country. The next Section will therefore delve further into the concrete funding opportunities for climate-induced human mobility.

2.4.2.2. Financing climate-induced human mobility?

The emerging climate finance system, including both bilateral financial support and a range of global climate funds, aims to provide sufficient and sustained financing to support adaptation action, in particular in developing countries⁹²². While the fragmented nature of the climate finance regime has provoked some criticism⁹²³, GEF supported adaptation projects have already proved to serve as a catalyst for change, deepening policymakers understanding of adaptation, and integrating adaptation

⁹¹⁸ Paragraph 95 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹¹⁹ Paragraph 102 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹²⁰ Paragraph 100 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹²¹ UNFCCC, Decision 3/CP.17 on 'Launching the Green Climate Fund', adopted at the Conference of the Parties at its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012.

⁹²² Paragraphs 95-137 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹²³ See for example L. Bouwer and J. Aerts, 'Financing climate change adaptation', 30 *Disasters* 1, 2006, p. 49-63.

action into development practices. As the GEF has financed some of the first concrete adaptation projects in the field, it has acquired important experience on how to build a community's resilience to the adverse effects of climate change⁹²⁴. However, it remains to be seen whether and how such funding could be allocated to projects relating to climate-induced migration, displacement and planned relocation.

Obviously both climate-induced displacement as well as government-led planned relocation require some financial means. In order to relief humanitarian crises, governments as well as international and national NGOs provide displaced persons with emergence relief such as food, water and shelter. And when governments start to relocate entire populations in anticipation of environmental changes, they need to provide the affected populations with adequate compensation⁹²⁵. However, also the facilitation of migration as an adaptation strategy requires the necessary funding. As discussed above, the adverse effects of global warming will severely touch upon household's resources, making them no longer available for migration. Therefore, the most vulnerable will require a transfer of resources in order to do justice to their right to leave their destructed environment. According to Gemenne, adaptation funding could serve to lift these financial barriers of the most vulnerable communities, so that migration can also for them become a viable adaptation strategy⁹²⁶. Financing projects of adaptive migration would prevent funding being limited to reactive funding, such as emergency relief in case people are forcibly displaced due to climate change impacts. Such anticipatory measures can thus prevent higher relief costs.

When at COP14 in Poznan migration was for the first time mentioned in the assembly text, discussions only marginally touched upon the financial implications of a migration paragraph in the international climate regime. In a proposal on an international climate insurance facility, the Alliance of Small Island States referred to longer-term processes that might include population displacement if the international community would not succeed to limit greenhouse gas emissions in a sufficient way⁹²⁷. Later, migration, displacement and planned relocation featured in the negotiation text under

⁹²⁴ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 1.

⁹²⁵ F. Gemenne, 'Climate-Induced Population Displacements in a 4° C+ World', 369 *Phil. Trans. R. Soc.* 1934, 2011, p. 191.

⁹²⁶ F. Gemenne, 'Climate-Induced Population Displacements in a 4° C+ World', 369 *Phil. Trans. R. Soc.* 1934, 2011, p. 190-19.

⁹²⁷ UNFCCC, Submission from the Alliance of Small Island States (AOSIS) on 'Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts', Submission to the UNFCCC's Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), 6 December 2008; K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25

a paragraph establishing an Adaptation Fund, to be based on contributions from developed countries⁹²⁸. Currently, most authors refer to the availability of adaptation funding as one of the most important implications of paragraph 14(f) of the Cancun Adaptation Framework. However, it is not (yet) clear to what kind of concrete projects this funding could be allocated. At this moment, it seems that countries would more easily be granted financial support in the form of adaptation funding for the more pragmatic, technical measures outlined in paragraph 14(f), such as funding for empirical research on climate migration. Funding for new international institutions or new migration statutes for climate-displaced persons are less likely to receive financial support. According to Warner, concrete project proposals relating to climate migration might be allocated financial support if they are formulated in terms of risk assessment, linked to larger mitigation and adaptation priorities⁹²⁹.

The main financial actors in adaptation funding have, up till now, not explicitly addressed climate-related movement as one of their objectives. From the funding mechanisms mentioned above, the Adaptation Fund is currently the only mechanism which actually has “population and human settlements” as one of its sectoral focuses⁹³⁰. However, all of these funding channels could possibly intervene now that climate migration is, through the incorporation of paragraph 14(f), recognised as a possible adaptation strategy⁹³¹.

Looking at some concrete examples of adaptation projects financed by the GEF, some recommendations can be made for the funding of climate-related movements. As discussed above, the LDCF finances the preparation and implementation of NAPAs in the LDCs. As migration, displacement and/or relocation projects are sometimes part of those NAPAs in certain countries, the question arises whether the LDCF could, via the implementation of NAPAs, fund activities related to climate-induced movement. In Bhutan for example, an LDCF project, aiming to prevent catastrophic

February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 9.

⁹²⁸ UNFCCC, ‘Reordering and Consolidation of Text in the Revised Negotiating Text’, Note by the Secretariat, prepared for the Seventh Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) from 28 September to 9 October 2009 in Bangkok, Thailand and from 2-6 November 2009 in Barcelona, Spain, FCCC/AWGLCA/2009/INF.2, 15 September 2009, §35(q), p. 41.

⁹²⁹ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25.

⁹³⁰ See UNFCCC’s adaptation funding interface at:

http://unfccc.int/adaptation/implementing_adaptation/adaptation_funding_interface/items/4638.php.

⁹³¹ B. Mayer, ‘International law and climate migrants: a human rights perspective’, IDLO Sustainable Development Law on Climate Change, Legal Working Paper Series N° 8, March 2011, available at: http://www.idlo.int/Publications/8_MayerBenoit_InternationalLawandClimateMigrants.pdf, p. 12.

glacial flash floods in the heavily populated Himalayan valleys, specifically addresses the temporary relocation of the population. The aim of the project was to reduce climate change-induced risks and vulnerabilities from Glacial Lake Outburst Floods (GLOFs) in the Punakha-Wangdi and Chamkar Valleys. As part of a two-pronged strategy, focusing on reducing the risk of GLOFs on the one hand, and building disaster risk preparedness on the other, the LDCF also financed local evacuation plans, establishing escape routes and safe areas for the population in case of GLOFs⁹³².

However, most LDCF financed adaptation projects do currently not include measures related to climate-induced human mobility. In Niger for example, the LDCF funded a project with the aim of improving the efficiency of dwindling water resources at the edge of the Saharan desert. As discussed in PART I of this research, Nigerien farmers and pastoralists suffer from food insecurity, due to, *inter alia*, extreme periods of drought, soil degradation and the shrinking of Lake Chad. As 90% of the population relies on the environment, being engaged in farming, cattle herding and fishing, their livelihood is severely threatened⁹³³. Being one of the poorest countries in the world, the adaptive capacity of Niger is extremely low. Based on priorities identified in the Nigerien NAPA, the LDCF finances a project to increase the resilience of food production systems and food-insecure rural communities in Niger. It does that for example through the dissemination of more drought-resilient crop varieties, or through the facilitation of food banks⁹³⁴. As food shortages usually occur for a brief period at the end of a dry season, it would seem possible to promote temporary labour migration as way to leverage those temporary food shortages. Furthermore, as it are mostly the young men who migrate, leaving their women, children and elderly behind, the return of migrants can help to financially support their relatives. Therefore, it can be recommended to offer migrants financial means, as an incentive to return back to their region of origin. Returned migrants can even be involved in the restoration of the environment (*e.g.* by creating jobs to fix sand dunes, control tree chopping, or dig out sand from the river)⁹³⁵. The IOM is the main international actor supporting voluntary return and reintegration programmes. However, as their budget is limited, it might be interesting to fund return migration programmes for environmentally-affected communities through

⁹³² B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 17.

⁹³³ T. Afifi, 'Economic or Environmental Migration? The Push Factors in Niger', 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e96.

⁹³⁴ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 16.

⁹³⁵ T. Afifi, 'Economic or Environmental Migration? The Push Factors in Niger', 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e112-113.

the LDCF or other GEF funds. It remains to be seen however whether the GEF would be willing to fund such adaptation projects with a migration aspect.

As for the other GEF funds, neither the SPA nor the SCCF have funded projects specifically addressing climate-related movements. However, just as for the LDCF, the possibility to include migration-related measures in GEF funded projects seems to exist. Through the SPA for example, the GEF has financed community-based adaptation projects (CBA projects), helping villagers in Bangladesh, Bolivia, Niger, Samoa and other countries to define and implement local responses to climate change impacts in their communities, seeking to enhance the communities' climate resilience⁹³⁶. Even though some of the communities involved in CBA projects had to deal with climate-related migration and displacement, this issue was not explicitly addressed in those projects. However, as lessons drawn from the CBA projects can promote the replication of successful projects into wider policies on community-based adaptation, it would be interesting to install pilot projects addressing climate-related migration as an adaptation strategy. For example in Samoa, livelihoods are affected by rapidly accelerating coastal erosion destroying local mangroves, an increasing sea level, an increasing frequency of storms and cyclonic activity, and high-intensity rainfall. The CBA project therefore assists the community to acquire more climate-resilient coastal resources and livelihoods. Implemented measures include the development of a climate-resilient natural resource management plan, the upgrading of the existing offshore seawall, and targeted mangrove replanting⁹³⁷. While climate migration was not included, it would seem possible, or even necessary in the long-term, to address the temporary and/or permanent relocation of the population. In the medium-term, international labour migration projects, based on the Colombia-Spain model⁹³⁸, could leverage some of the livelihood shortages of the affected community. The NAPA of Samoa already includes the "incremental relocation of community and government assets" to areas outside the Coastal Hazard Zones in its list of priority adaptation actions⁹³⁹, and can thus provide a first basis to fund migration-related projects in Samoa.

As for the fast track finance system, agreed upon in Copenhagen and confirmed later in Cancun, the most vulnerable states, such as the LDCs and small-island developing states, are granted priority for

⁹³⁶ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 11.

⁹³⁷ B. Biagini, L. Christiansen, T. Bernardini and R. Moore, 'Global Environment Facility, Financing Adaptation Action', Global Environment Facility (GEF), November 2007, available at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf>, p. 12.

⁹³⁸ See PART I of this research.

⁹³⁹ National Adaptation Programme of Action (NAPA) of Samoa, December 2005, available at: <http://unfccc.int/resource/docs/napa>, p. 48-49.

adaptation programmes. It is not clear however to what extent migration-related projects can or will receive funding⁹⁴⁰. As of May 2012, the list of approved projects under the fast track finance system does not include any projects or programmes expressly focusing on climate-induced migration, displacement or planned relocation⁹⁴¹. The future will have to clarify whether those projects will indirectly address climate-related movement, for example through the implementation of NAPAs.

Finally, as for the Green Climate Fund, Gemenne argues that funding under this new Fund should be allocated to places of destination as well as places of origin, as climate-induced migration will require adaptation of the destination countries as well⁹⁴². This would ask for a change of thinking about adaptation funding, as adaptation is currently framed as adaptation in the place of origin, serving amongst others to prevent climate-induced migration and displacement. However, in an ever warming climate, destination places, both in the country of origin as well as abroad, should be prepared to deal with an additional influx of climate-induced migrants and displaced persons. In order to support destination areas to cope with higher demographic pressures, adaptation policies should also be directed at them, in order to help them to meet the newcomers' needs, for example by providing them with sufficient housing, jobs and schools⁹⁴³. However, as the Green Climate Fund, just as most of the adaptation funds, specifically provides financial assistance to developing countries, destination regions in the developed world would not be eligible for adaptation funding.

In sum, the inclusion of human mobility in the Cancun Adaptation Framework has signalled to the international community that investments are needed to finance research and cooperation on climate-related movement. As paragraph 14(f) has given the issue a "high degree of legitimacy", Warner expects that this could encourage governments and organisations to support activities to enhance the knowledge base on climate-induced human mobility⁹⁴⁴. For projects related to climate migration to receive adaptation funding, countries first need to identify migration as an adaptation measure, for example by incorporating the issue in the development and implementation of NAPAs, and then need to ask for financial support, for example from one of the GEF funds. In comparison to

⁹⁴⁰ S. Martin, 'Climate Change, Migration and Governance', 16 *Global Governance on Migration* 3, July-September 2010, p. 401-402.

⁹⁴¹ See for an updated list of approved projects under the Fast Track Finance System: <http://www.faststartfinance.org/content/recipient-countries>.

⁹⁴² F. Gemenne, 'Climate-Induced Population Displacements in a 4° C+ World', 369 *Phil. Trans. R. Soc.* 1934, 2011, p. 182-195.

⁹⁴³ F. Gemenne, 'Climate-Induced Population Displacements in a 4° C+ World', 369 *Phil. Trans. R. Soc.* 1934, 2011, p. 191.

⁹⁴⁴ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 10.

other spheres that could potentially make funding available for climate-related migration, such as humanitarian assistance, development aid and funding from migration organisations, climate adaptation funding indeed appears to contain most financial opportunities for the issue. However, the incorporation of human mobility in the Cancun Adaptation Framework will, in my opinion, not lead to the funding of specific projects focusing on international migration or relocation, nor will it lead to a protection framework for internationally-displaced persons.

2.5. Implications of the Cancun human mobility reference

Paragraph 14(f) of the Cancun Adaptation Framework does not contain any legally-binding obligations for the State Parties to the UNFCCC. However, it has an important political and symbolic value, and will go down in history as the first ever mentioning of migration in an official COP decision in the international climate framework. It is emblematic to the recognition of the linkage between environmental degradation and migration, and, more in particular, of the positive role of migration as an adaptive strategy for environmentally-affected communities⁹⁴⁵. The way the topic has been treated by the UNFCCC negotiators, that is: as a technical matter, part of adaptation action, and generating only voluntary measures, made it acceptable to the international climate community⁹⁴⁶.

As the migration provision is situated in an important part of the UNFCCC Adaptation Framework, it clearly has implications for policy as well as on the ground operations. As discussed above, human mobility is now included in a list of activities that might be fundable under the UNFCCC's financial regime. Importantly, it provides a framework to hold states accountable to, and to encourage implementation of migration-related policy measures on the ground, for example through the incorporation of migration into national adaptation strategies. It might thus act as a catalyst for national action, and at the same time encourage regional and international policymakers to address climate-induced migration, displacement and planned relocation.

⁹⁴⁵ B. Gogarty, 'Climate-Change Displacement: Current Legal Solutions to Future Global Problems', 21 *Journal of Law, Information and Science* 1, 2011, p. 16.

⁹⁴⁶ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 11.

The inclusion of climate-induced migration in the Cancun Agreements has clearly raised the global interest in the topic. Although the legal relevance of paragraph 14(f) is questionable, it has brought the issue under policymakers' attention, and has given the most vulnerable victims of climate change a voice in the international climate negotiations⁹⁴⁷. Due to widespread media coverage, the general public has also become acquainted with climate-induced migrants. Since the Cancun summit, several governments have hosted international conferences on the topic, and have supported important research projects⁹⁴⁸.

Furthermore, paragraph 14(f) might encourage the international community to include the issue into other branches of international environmental law, such as international biodiversity law (*see further under Chapter V*). It might also influence other policy fora and organisations addressing migration and displacement at the national, regional and international level, such as the Global Forum for Migration and Development (GFMD) or the UNHCR, to start discussing the topic of environment-induced migration more thoroughly⁹⁴⁹. After all, if the issue would be taken up in more international or regional arenas on migration-related matters, it might in the long run lead to binding commitments in international agreements. As states currently remain reluctant to support more than dialogue and knowledge-building on the topic, specifically when it concerns international migration, a more coordinated and comprehensive advocacy through various policy fora could stimulate the discussion further along the way of action-oriented policies and legally-binding agreements regarding environment-induced migration⁹⁵⁰.

However, it is important to keep in mind that the reason why migration provoked less discussion in the UNFCCC than in other political fora, such as the EU, is not only due to the text placement, or the treatment of the issue as a "technical" one, but also, and perhaps mostly, because paragraph 14(f)

⁹⁴⁷ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR, Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 13.

⁹⁴⁸ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25.

⁹⁴⁹ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 200.

⁹⁵⁰ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 16.

does not have any consequences for what can be called the last bastion of national sovereignty, namely national borders and states' immigration policy. Although paragraph 14(f) *invites* states to enhance understanding, cooperation and coordination regarding climate-induced human mobility, it does not "invite" them to grant residence rights to climate-induced displaced persons, or to facilitate international migration as an adaptation strategy, not to mention that it would *oblige* them to do so. Furthermore, there are clearly less financial means available in other migration-related arena, such as the GFMD, than in the international climate framework.

Finally, paragraph 14(f) symbolises a new conceptualisation of adaptation, which is better equipped to deal with future climatic changes⁹⁵¹. A world which might have to face a temperature increase of 4°C demands more drastic adaptive solutions than the ones put on the table up till now. National and international adaptive migration and planned relocation might be part of such drastic adaptation measures. Paragraph 14(f) is thus part of longer-term thinking to deal with the adverse effects of climate change, indicating a transition from current short- and medium term emergency approaches focusing on *in situ* adaptation⁹⁵².

3. THE WAY FORWARD

Even though paragraph 14(f) of the Cancun Agreements represents a breakthrough for the topic of environment-induced migration, it can and should not be the end of the quest for a legal response to this increasingly important issue. Likewise, the Cancun Agreements themselves are not the end of the search for an "agreed outcome" in the international climate change framework, as requested by the Bali Action Plan⁹⁵³. This Section therefore looks ahead at how human mobility might find its place in future international climate negotiations, and discusses some of the proposals to be found in literature for an additional protocol to the UNFCCC on climate-induced migration.

⁹⁵¹ K. Warner, 'Migration as Adaptation in the UNFCCC Climate Negotiations', Presentation at the Conference on 'Climate Change and Migration in the Asia-Pacific: Legal and Policy Responses', Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW, NSW Parliament House, Sydney, Australia, 10-11 November 2011, available at: <https://tv.unsw.edu.au/Video/Climate-Change-and-Migration-Session-4>.

⁹⁵² K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25-26.

⁹⁵³ UNFCCC, Bali Action Plan, Decision 1/CP.13, adopted at the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, FCCC/CP/2007/6/Add.1, 14 March 2008, § 1.

3.1. Towards a legally-binding mobility reference?

3.1.1. On a future legal architecture for the international climate regime

Just as the Copenhagen Accord, the Cancun Agreements did not put an end to some of the fundamental discussions within the international climate regime, such as the fate of the Kyoto Protocol, the legal architecture of the future climate regime, and the need for a differentiated treatment between developed and developing countries. Among other things, the operationalisation of the Adaptation Committee and the Green Climate Fund remained unclear, and needed further elaboration. However, as for the legal form of the climate regime, the Cancun Agreements did “offer a vivid glimpse into the future”⁹⁵⁴.

Despite the progress made in Cancun, there is still a long way to go. From 28 November to 11 December 2011, a new era of climate change negotiations was launched with COP17, which was held in Durban, South-Africa, together with the 14th Session of the AWG-LCA, the 16th Session of the AWG-KP, and the 35th Session of the SBI. Aside from a number of conclusions by subsidiary bodies, this conference resulted in the adoption of 19 COP decisions on a wide range of topics, including decisions on long-term cooperative action under the Convention and the operationalisation of the Green Climate Fund. After the efforts to rescue the international climate regime in Cancun, Parties now came to an agreement on a second commitment period under the Kyoto Protocol, to begin on 1 January 2013 and end either on 31 December 2017 or on 31 December 2020, to be decided upon by AWG-KP 17⁹⁵⁵. Furthermore, the outcome of the Durban summit included a decision by Parties to adopt a universal legal instrument on climate change as soon as possible, and no later than 2015⁹⁵⁶.

⁹⁵⁴ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 511.

⁹⁵⁵ UNFCCC, Decision 1/CMP.7 on the ‘Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Sixteenth Session’, adopted at the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its Seventh Session, held in Durban from 28 November to 11 December 2011, FCCC/KP/CMP/2011/10/Add.1, 15 March 2012, § 1.

⁹⁵⁶ UNFCCC, Decision 1/CP.17 on the ‘Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 2-4.

Therefore, the mandate of the AWG-LCA was extended for one more year in order to continue its work and present its outcomes at COP 18 in Doha in December 2012⁹⁵⁷.

The package agreed upon in Durban thus reaffirmed the international community's trust in the UN climate negotiations⁹⁵⁸. As for enhanced action on adaptation, the work in Durban was resumed under the AWG-LCA. The AWG-LCA's Outcome Decision 2/CP.17 established among other things the modalities and procedures for the functioning of the Adaptation Committee⁹⁵⁹. However, the existing mitigation pledges did still not correspond to the emission reductions deemed necessary by scientists. As the Durban summit did not deliver an outcome that ensures the fulfilment of the Convention's ultimate objective, that is to prevent dangerous human interference with the climate system⁹⁶⁰, discussions needed to continue further. The Kyoto Protocol still not covers the world's largest emitters, and, importantly, Parties still need to agree on the future legal architecture of the international climate regime.

In Durban, discussions on this future legal architecture mainly focused on the linkages between the legal form of the AWG-LCA outcome and the adoption of a second commitment period under the Kyoto Protocol⁹⁶¹. Parties struggled on how to reconcile the termination of the first Kyoto commitment period with the challenge of codifying the emission reduction pledges made in Cancun in a new legal instrument⁹⁶². The legal options for a possible AWG-LCA outcome were narrowed down in a decision establishing an Ad Hoc Working Group on the Durban Platform for Enhanced Action (AWG-DP). Parties agreed to "launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC applicable to all Parties", through this new subsidiary body under the Convention⁹⁶³. Starting its work in the first half of 2012, the aim of the AWG-DP is to complete its work as early as possible, but no later than 2015, in order

⁹⁵⁷ UNFCCC, Decision 1/CP.17 on the 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, §1.

⁹⁵⁸ Earth Negotiations Bulletin, Vol. 12, N° 534, published by the International Institute for Sustainable Development, IISD, 13 December 2011, available at: <http://www.iisd.ca/Download/Pdf/Enb12534e.Pdf>, p. 1.

⁹⁵⁹ UNFCCC, Decision 2/CP.17 on the 'Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', adopted by the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, p. 4-54, § 93-119.

⁹⁶⁰ Article 2 of the UNFCCC.

⁹⁶¹ Earth Negotiations Bulletin, Vol. 12, N° 534, published by the International Institute for Sustainable Development, IISD, 13 December 2011, available at: <http://www.iisd.ca/Download/Pdf/Enb12534e.Pdf>, p. 22-23.

⁹⁶² Earth Negotiations Bulletin, Vol. 12, N° 534, published by the International Institute for Sustainable Development, IISD, 13 December 2011, available at: <http://www.iisd.ca/Download/Pdf/Enb12534e.Pdf>, p. 29.

⁹⁶³ UNFCCC, Decision 1/CP.17 on the 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, §2-4.

to adopt this protocol, legal instrument or agreed outcome with legal force at COP 21, and for it to come into effect and be implemented from 2020 onwards.

Even though the Durban summit delivered a clear mandate to negotiate on a legal agreement, it still remained obscure which legal form this instrument must take, and what its relationship to the Kyoto Protocol should be. While most developed countries prefer to replace the Kyoto Protocol by a new legal instrument, integrating the two negotiation tracks, a lot of developing countries are opposed to such an instrument, and prefer to conserve the distinction between developed and developing countries⁹⁶⁴. Rajamani argues that the most significant factor hindering substantive progress on a post-2012 climate regime is “the lack of trust amongst some developing countries that industrialised countries will, given current and past form, honour their commitments, and/or take the lead in the new climate agreement”⁹⁶⁵. The various legal form options available to the negotiating Parties, ranging from a legally-binding instrument supplementing or replacing either the UNFCCC or the Kyoto Protocol, an amendment or a set of amendments to the Convention, a single COP decision or a set of COP decisions implementing the Convention, or any combination of these options, all require different procedures and have other regime-building characteristics. The choice will be determined by political and strategic considerations at play⁹⁶⁶. However, as Rajamani rightly puts, “[i]t is axiomatic that form should follow function, and that the treatment of the legal form question should be guided by the substantive outcomes that emerge from the negotiations”⁹⁶⁷.

3.1.2. How does human mobility fit in?

As climate-induced human mobility was incorporated into the Cancun Agreements, the question now rises where and how this issue will fit into the new era of international climate negotiations. According to Warner, migration, displacement and planned relocation will not “quietly be forgotten”

⁹⁶⁴ L. Rajamani, ‘The Cancún Climate Agreements: Reading the Text, Subtext and Tea Leaves’, 60 *International and Comparative Law Quarterly*, April 2011, p. 513-514.

⁹⁶⁵ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 805.

⁹⁶⁶ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 807.

⁹⁶⁷ L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 829.

in future negotiations, as they are now part of the Cancun Adaptation Framework, and are linked to emerging institutions such as the Adaptation Committee and the new climate finance regime⁹⁶⁸.

Parties agreed that the process to come to a new legal instrument shall be informed, *inter alia*, by the Fifth Assessment Report of the IPCC, and the work of the subsidiary bodies⁹⁶⁹. As the IPCC has now dedicated a separate section to climate-induced migration in its Fifth Assessment Report⁹⁷⁰, UNFCCC delegates cannot ignore the issue in their discussions on a future legal instrument. However, the extent to which human mobility will play a leading part in the negotiations on enhanced action on adaptation, will depend on the involvement of observing humanitarian organisations and the research community, which have up till now kept the issue under the attention of UNFCCC delegates⁹⁷¹. After the adoption of the Cancun Agreements, the IOM has for example continuously put considerable efforts in keeping this topic on the negotiation table, and has given the UNFCCC process some input on how to implement paragraph 14(f) within the line of the Organisation's mission⁹⁷². The IOM supports for example advanced knowledge-building, in particular on the role of migration as an adaptation strategy, and encourages social and economic development through migration. At the Durban conference, the IOM contributed to various interagency side events, while William Lacy Swing, the IOM's Director General, gave a speech at the High level plenary. In his remarks, he focused among other things on the linkage between migration and adaptation to

⁹⁶⁸ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25.

⁹⁶⁹ UNFCCC, Decision 1/CP.17 on the 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012, § 6.

⁹⁷⁰ Intergovernmental Panel on Climate Change (IPCC), 'Fifth Assessment Report: Contribution of Working Group II to the IPCC's 5th Assessment Report, *Climate Change 2014: Impacts, Adaptation, and Vulnerability*' (Final Draft Report released on 31 March 2014), available at: <http://ipcc-wg2.gov/AR5/report/final-drafts/>. See Chapter 12.4. on 'Migration and Mobility Dimensions of Human Security', p. 11-15.

⁹⁷¹ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25.

⁹⁷² See for example International Organisation for Migration (IOM), Submission to the UNFCCC concerning Draft Decisions 23 and 24 of -/CP.17 of the National Adaptation Plans (NAPs), Information on Support to the National Adaptation Plan Process in the Least Developed Countries, Subsidiary Body for Implementation at its Thirty-Sixth Session, held in Bonn from 14-25 May 2012, 12 April 2012.

address the challenges posed by climate change, stating that well-planned migration can reduce the risks of forced displacement. Therefore, adaptation plans should take migration into consideration⁹⁷³.

In order to keep the issue of climate-induced migration alive in current climate negotiations, such advocacy work, together with a more focused and better-oriented knowledge-building, is crucial. According to Warner, [t]he key will be to align Party appetite and needs with a range of appropriate and politically feasible ‘asks’⁹⁷⁴, taking the sensitivity of states towards issues such as liability and compensation into account. However, as a comprehensive solution for climate-induced migrants demands more than what seems to be “politically feasible” at first sight, policy proposals from academics and humanitarian organisations should not be limited to such modest ideas. Even though calls for a new international convention on climate-induced migration seem a bridge too far, we should, in my opinion, aim for more than mere ‘measures to enhance understanding, cooperation and coordination with regard to climate change induced displacement, migration and planned relocation’. Aside from demands for more dialogue, understanding and regional cooperation on the topic, proposals for the legal protection of forcibly displaced persons and more migration opportunities for vulnerable communities should not be forgotten, in future climate negotiations as well as in other legal frameworks.

It is now up to the Parties to the UNFCCC to decide whether climate-induced human mobility will retain its place in the final outcome document of their discussions on an “agreed outcome”. Hopefully, many years of negotiations will finally result in a legally-binding agreement, with clear and binding commitments on both mitigation and adaptation action, including binding state obligations concerning climate-induced human mobility.

Up till now, the last big hurdle that was taken in the international climate negotiations was COP18 in Doha, Qatar, which represented another opportunity to advance the issue of migration and displacement in the climate change negotiations. Various side events were organised on the issue, among which the event hosted by the IOM on “How to Integrate Migration into Adaptation Strategies and Planning”⁹⁷⁵. Together with, among others, the UNU-EHS, the IOM was pushing to

⁹⁷³ International Organisation for Migration (IOM), ‘The Migration-Climate Change Nexus’, Remarks by William Lacy Swing, IOM’s Director General, at the Conference of the Parties (COP 17) and Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP), High Level Plenary, 9 December 2011.

⁹⁷⁴ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 28-29.

⁹⁷⁵ See <http://www.iom.int/files/live/sites/iom/files/pbn/docs/IOM-COP18-Side-Event-Flyer.pdf>.

finally implement paragraph 14(f) at COP18. However, in the months leading to this climate summit in Qatar, climate change-related migration was not only considered through an adaptation lens, but also as part of the new ‘loss and damage’-paradigm. Therefore, the next Section will discuss how the discussions on addressing loss and damage associated with the adverse effects of climate change could be relevant for the issue of climate-induced human mobility.

3.2. Addressing loss and damage associated with the adverse effects of climate change

3.2.1. From the SBI Work Programme on Loss and Damage to the Warsaw Loss and Damage Mechanism

At COP15 in Copenhagen, states agreed to cut greenhouse gas emissions so as to limit the global average temperature increase to no more than 2°C above pre-industrial levels. According to scientists, this is necessary to avoid the worst impacts of climate change. However, even this 2°C increase could have catastrophic effects for some regions of the world. Moreover, in November 2012, the annual Emissions Gap Report of UNEP already warned that the earth is set to grow 2°C in this century alone⁹⁷⁶. And a report commissioned by the World Bank has even warned that “without serious policy changes”, the average global temperature is on track to rise by 4°C by the end of this century⁹⁷⁷. In any case, it is clear that the world will change in such a way that it will face drastic environmental changes. Fortunately, policymakers are now increasingly aware that simply adapting to the adverse effects of climate change will not be enough. We also need to address the unavoidable loss and damage associated with the adverse effects of global warming.

At the Cancun summit in December 2010, the COP therefore established a work programme under the SBI in order to consider approaches to address loss and damage associated with climate change

⁹⁷⁶ United Nations Environment Programme, ‘The Emissions Gap Report 2011: A UNEP Synthesis Report’, published by the United Nations Environment Programme, Nairobi, November 2012, available at: <http://www.unep.org/Pdf/2012gapreport.Pdf>.

⁹⁷⁷ ‘Turn Down the Heat: Why a 4°C Warmer World Must be Avoided’, Report for the World Bank by the Potsdam Institute for Climate Impact Research and Climate Analytics, Washington, November 2012, p. ix; ‘Climate Change: When the Damage is Done’, *IRIN Humanitarian News and Analysis*, 23 November 2012, available at: <http://www.irinnews.org/report/96867/climate-change-when-the-damage-is-done>.

impacts in developing countries that are particularly vulnerable to the adverse effects of climate change, thereby recognising the need to strengthen international cooperation and expertise so as to understand and reduce this loss and damage⁹⁷⁸. The COP also requested the SBI “to agree on activities to be undertaken under the above-mentioned work programme”⁹⁷⁹, and to make recommendations on loss and damage to the COP for consideration at its 18th Session in Doha two years later⁹⁸⁰. Parties and relevant organisations were invited to submit their views on what elements should be included in the work programme, including: “(a) the possible development of a climate risk insurance facility to address impacts associated with severe weather events; (b) options for risk management and reduction, risk sharing and transfer mechanisms such as insurance, including options for micro-insurance, and resilience building, including through economic diversification; (c) approaches for addressing rehabilitation measures associated with slow onset events; (d) engagement of stakeholders with relevant specialised expertise”⁹⁸¹.

Longer term foreseeable climate change impacts, such as sea level rise and desertification, were thus discussed under the new SBI Work Programme on Loss and Damage⁹⁸². Although there is no agreed definition of the terms ‘loss’ and ‘damage’, it was generally agreed that the terms referred to “a range of harms incurred in developing countries from the impacts of climate change that cannot be avoided either through mitigation or adaptation”⁹⁸³. The question of course rised why the negotiators came up with this new terminology, which is not present in the Convention itself. According to Saleemul Huq, the lead author of the adaptation chapters in the IPCC’s 5th Assessment Report, this new negotiation area could be described as “the third paradigm in the UNFCCC process”, next to mitigation and adaptation, as a new strategy to respond to the adverse effects of climate change. The issue perhaps seems a bit controversial, as it could refer to a “right to compensation”,

⁹⁷⁸ Paragraph 25-26 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹⁷⁹ Paragraph 27 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹⁸⁰ Paragraph 29 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹⁸¹ Paragraph 28 of the Cancun Agreements, AWG-LCA Outcome Decision.

⁹⁸² M. Gromilova, ‘The Issue of Climate-Induced Displacement from the Perspective of International Environmental Law’, Thesis submitted to the Tilburg University in partial fulfilment of the requirements for the degree Research Masters in Law, under supervision of Prof. J.M. Verschuuren, 28 June 2012, available at: <http://arno.uvt.nl/show.cgi?fid=122940>, p. 20.

⁹⁸³ ‘Climate Change: When the Damage is Done’, *IRIN Humanitarian News and Analysis*, 23 November 2012, available at: <http://www.irinnews.org/report/96867/climate-change-when-the-damage-is-done>; K. Warner, K. Van der Geest, S. Kreft, S. Huq, S. Harmeling, K. Kusters and A. De Sherbinin, ‘Evidence from the Frontlines of Climate Change: Loss and Damage to Communities Despite Coping and Adaptation’, Loss and Damage in Vulnerable Countries Initiative, Policy Report No. 9, United Nations University Institute for Environment and Human Security (UNU-EHS), November 2012, Bonn, available at: <http://www.ehs.unu.edu/File/Get/10584.Pdf>, p. 20.

and an “obligation on the part of developed countries to provide it”⁹⁸⁴. However, it was put on the negotiation table to replace even more sensitive terms such as compensation and liability. Nonetheless, it is expected that negotiators will arrive back at the liability/compensation issue when going further into discussions on loss and damage. After all, the main question remains who should pay the costs of rebuilding lives and livelihoods when vulnerable communities in developing countries suffer loss and damage from the adverse effects of climate change.

In the months leading to COP17 in Durban, the SBI distinguished three broad thematic areas in the implementation of the Work Programme on Loss and Damage, namely:

- I. Assessing the risk of loss and damage associated with the adverse effects of climate change and current knowledge on the same,
- II. A range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events, taking into consideration experiences at all levels,
- III. The role of the Convention in enhancing implementation of approaches to address loss and damage associated with the adverse effects of climate change⁹⁸⁵.

At the Durban summit, the COP requested the Secretariat to carry out activities concerning these three mandated thematic areas, and invited Parties, relevant intergovernmental organisations, civil society and other relevant stakeholders to take these areas into account when supporting Parties to address loss and damage, and to share the outcome of their activities⁹⁸⁶.

In the months leading to the UN climate talks in Doha, the issue of loss and damage increasingly came to the centre of attention in the negotiations. After two years of meetings and studies, the SBI managed to report its findings to the COP, and considered new proposals on how to deal with loss and damage. At the 37th Session of the SBI in Doha from 26 November to 1 December 2012, the SBI took note of the exchange of views that took place in the run-up to the Doha conference, and elaborated draft recommendations on loss and damage associated with the adverse effects of

⁹⁸⁴ ‘Climate Change: When the Damage is Done’, *IRIN Humanitarian News and Analysis*, 23 November 2012, available at: <http://www.irinnews.org/report/96867/climate-change-when-the-damage-is-done>.

⁹⁸⁵ UNFCCC, Report of the Subsidiary Body for Implementation on its Thirty-Fourth Session, held in Bonn from 6 to 17 June 2011, FCCC/SBI/2011/7, 12 August 2011, §109.

⁹⁸⁶ UNFCCC, Decision 7/CP.17 on the ‘Work Programme on Loss and Damage’, adopted at the Conference of the Parties on its Seventeenth Session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1, 15 March 2012.

climate change⁹⁸⁷. The COP adopted these recommendations, and decided to establish institutional arrangements to address loss and damage, such as an international mechanism, including functions and modalities, at its 19th session⁹⁸⁸.

Pursuant to this decision, at COP 19 in Warsaw, the COP established the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts under the Cancun Adaptation Framework⁹⁸⁹. This mechanism aims to “to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change”⁹⁹⁰. The Warsaw Loss and Damage Mechanism promotes “the implementation of approaches to address loss and damage associated with the adverse effects of climate change”, by undertaking, *inter alia*, the following functions:

- (a) Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts,
- (b) Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders,
- (c) Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change, so as to enable countries to undertake actions pursuant to decision 3/CP.18, paragraph 6⁹⁹¹.

⁹⁸⁷ UNFCCC, ‘Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity’, Draft Conclusions proposed by the Chair, Subsidiary Body for Implementation (SBI) at its Thirty-Seventh Session, held in Doha from 26 November to 1 December 2012, FCCC/SBI/2012/L.44, 1 December 2012.

⁹⁸⁸ UNFCCC, Decision 3/CP.18 on ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’, adopted at the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012, FCCC/CP/2012/8/Add.1, 28 February 2013, §9.

⁹⁸⁹ UNFCCC, Decision 2/CP.19 on the ‘Warsaw international mechanism for loss and damage associated with climate change impacts’, adopted at the Conference of the Parties on its Nineteenth Session, held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10/Add.1, 31 January 2014.

⁹⁹⁰ UNFCCC, Decision 2/CP.19 on the ‘Warsaw international mechanism for loss and damage associated with climate change impacts’, adopted at the Conference of the Parties on its Nineteenth Session, held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10/Add.1, 31 January 2014, §1.

⁹⁹¹ UNFCCC, Decision 2/CP.19 on the ‘Warsaw international mechanism for loss and damage associated with climate change impacts’, adopted at the Conference of the Parties on its Nineteenth Session, held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10/Add.1, 31 January 2014, §5.

The COP also decided to review the Warsaw loss and damage mechanism at the twenty-second session of the Conference of the Parties, which will be held at the end of 2016, with a view to adopting an appropriate decision on the outcome of this review⁹⁹².

Important to note is the fact that the Warsaw Loss and Damage Mechanism was established under the Cancun Adaptation Framework, which might open some opportunities to fully address environment-related population movements, in particular displacement and forced relocation, as part of the losses and damage associated with the adverse effects of climate change.

3.2.2. Addressing climate-induced mobility as loss and damage

In the SBI Work Programme on Loss and Damage, risk reduction, risk retention and risk transfer received a lot of attention as approaches to address loss and damage. However, these approaches appear to be too limited for many vulnerable regions. Transferring the cost of loss and damage through a third party, for example through a form of insurance or other risk-sharing mechanisms, does not work well for high-probability events or transformations⁹⁹³. UNFCCC delegates will therefore have to think out of the box when addressing loss and damage in the climate change negotiations.

According to Juan Hoffmaister, loss and damage coordinator for G77 and China, and Doreen Stabinsky, professor of global environmental politics at the College of the Atlantic in the US, migration and planned relocation could become the only coping mechanisms when certain areas become uninhabitable and risk reduction, like adaptation, becomes impossible⁹⁹⁴. Clearly, if migration fails as an adaptation strategy, at least displacement and forced relocation should be categorised as loss and damage associated with climate change impacts.

⁹⁹² UNFCCC, Decision 2/CP.19 on the 'Warsaw international mechanism for loss and damage associated with climate change impacts', adopted at the Conference of the Parties on its Nineteenth Session, held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10/Add.1, 31 January 2014, §15.

⁹⁹³ 'Climate Change: When the Damage is Done', *IRIN Humanitarian News and Analysis*, 23 November 2012, available at: <http://www.irinnews.org/report/96867/climate-change-when-the-damage-is-done>.

⁹⁹⁴ J.P. Hoffmaister and D. Stabinsky, 'Loss and Damage: Some Key Issues and Considerations for SIDS Expert Meeting', Briefing Paper on Loss and Damage, SIDS Expert Meeting, 9-11 October 2012, Bridgetown, Barbados, Third World Network (TWN), available at: http://unfccc.int/files/adaptation/cancun_adaptation_framework/loss_and_damage/application/pdf/loss_and_damage_bp4_sids.pdf, p. 2.

In Doha, the COP requested the Secretariat to develop a technical paper on non-economic losses⁹⁹⁵. According to the SBI, such a technical paper could include issues such as “loss of territory, livelihood, health, culture and eco-systems, including the modalities of rehabilitation and compensation”⁹⁹⁶. The technical paper that followed this request assessed how non-economic losses contribute to loss and damage and the total cost of climate change, and listed the main types of non-economic losses that might occur and the ways in which they may materialize⁹⁹⁷. This assessment of non-economic and non-quantifiable losses also took the needs of people migrating or being displaced due to climate change into account. Human mobility was considered as a form of loss and damage, with displacement as “the clearest case of loss and damage across the continuum of human mobility”⁹⁹⁸.

Through workshops, expert meetings and other ways, the SBI Work Programme on Loss and Damage aimed to support the SBI to make recommendations to the COP, for consideration at its 18th Session in Doha, on how to assess loss and damage and how to address it. This offered an opportunity to make recommendations concerning climate-induced mobility to the COP. In a joint submission to the SBI Work Programme of October 2012, several organisations, including the UNHCR, UNU, NRC, the Special Rapporteur on the Human Rights of Internally Displaced Persons and the IOM, addressed the potential role of the SBI Work Programme on Loss and Damage for the governance, legal, and institutional challenges arising from climate-induced human mobility. Along the line of the three thematic areas of the Work Programme, the organisations outlined how the UNFCCC regime could help to assess and address future loss and damage for communities which are vulnerable to migration, displacement and planned relocation⁹⁹⁹.

⁹⁹⁵ UNFCCC, Decision 3/CP.18 on ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’, adopted at the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012, FCCC/CP/2012/8/Add.1, 28 February 2013, § 10(b).

⁹⁹⁶ UNFCCC, ‘Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity’, Draft Conclusions proposed by the Chair, Subsidiary Body for Implementation (SBI) at its Thirty-Seventh Session, held in Doha from 26 November to 1 December 2012, FCCC/SBI/2012/L.44, 1 December 2012, § 12(c).

⁹⁹⁷ UNFCCC, Technical paper on ‘Non-economic losses in the context of the work programme on loss and damage’, FCCC/TP/2013/2, 9 October 2013.

⁹⁹⁸ UNFCCC, Technical paper on ‘Non-economic losses in the context of the work programme on loss and damage’, FCCC/TP/2013/2, 9 October 2013, §82-86.

⁹⁹⁹ UNFCCC, Submission on ‘Human Mobility in the Context of Loss and Damage from Climate Change: Needs, Gaps, and Roles of the Convention in Addressing Loss and Damage’, Joint Submission by the United Nations High Commissioner for Refugees (UNHCR), UN University (UNU), the Norwegian Refugee Council (NRC) and its Internal Displacement Monitoring Centre (IDMC), the Special Rapporteur on the Human Rights of Internally Displaced Persons and the International Organisation for Migration (IOM) to the SBI Work Programme on Loss and Damage, 19 October 2012.

In my opinion, the UNFCCC framework already contains a lot of relevant elements for addressing loss and damage that should be taken into consideration as negotiators discuss the next steps of the UNFCCC mechanism to address loss and damage. Through paragraph 14(f) of the Cancun Agreements, the Cancun Adaptation Framework already invited states to take measures to enhance understanding, coordination and cooperation with regard to climate change-induced migration, displacement and planned relocation. In implementing this migration provision, attention should also focus on trying to address human mobility as 'loss and damage' for vulnerable communities living in uninhabitable regions.

Hoffmaister and Stabinsky recommended for example to target climate-induced mobility in the Doha outcome, and to call for cooperation with UNHCR and the IOM as part of the second phase of the SBI Loss and Damage Work Programme, with collaboration of the Adaptation Committee¹⁰⁰⁰. In a report of November 2011 synthesizing the views and information submitted by Parties and relevant organizations, the importance of a broad participation of stakeholders in addressing each of the three thematic areas of the Work Programme was stressed, including international, regional, national and local entities, NGOs, civil society, and academics that are involved in migration issues¹⁰⁰¹. As the SBI Work Programme on Loss and Damage aimed to "strengthen international cooperation and expertise to understand and reduce loss and damage associated with the adverse effects of climate change", it should include effects on human mobility¹⁰⁰². Stakeholder organisations thus informed the Work Programme on the kind of actions they deemed necessary.

In the assessment of loss and damage (Thematic Area I), it is important to also assess actual and potential human mobility associated with the adverse effects of climate change. According to the UNHCR, IOM, UNU and other organisations in their Joint Submission to the SBI Work Programme, the UNFCCC regime could help to fill the knowledge gap on climate-induced mobility, by requesting targeted research and collecting new views and experiences, for example on migration as an

¹⁰⁰⁰ J.P. Hoffmaister and D. Stabinsky, 'Loss and Damage: Some Key Issues and Considerations for SIDS Expert Meeting', Briefing Paper on Loss and Damage, SIDS Expert Meeting, 9-11 October 2012, Bridgetown, Barbados, Third World Network (TWN), available at: http://unfccc.int/files/adaptation/cancun_adaptation_framework/loss_and_damage/application/pdf/loss_and_damage_bp4_sids.pdf, p. 9.

¹⁰⁰¹ UNFCCC, 'Synthesis Report on Views and Information on the Thematic Areas in the Implementation of the World Programme', Note by the Secretariat, Subsidiary Body for Implementation (SBI) at its Thirty-Fifth Session, held in Durban from 28 November to 3 December 2011, FCCC/SBI/2011/Inf.13, 9 November 2011, p. 7-8.

¹⁰⁰² K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 26.

adaptive response in pastoral communities. Such knowledge could then be incorporated into national adaptation planning through the NAP process. Furthermore, the UNFCCC framework has a role to play in enhancing data collection and acting as a repository for expertise and good practice on climate-induced population movements¹⁰⁰³. Warner even claimed that paragraph 14(f) of the Cancun Agreements could make funding available to support initiatives to fill the knowledge gap on migration and displacement as loss and damage inflicted by climate change¹⁰⁰⁴.

As for Thematic Area II (*A range of approaches to address loss and damage associated with the adverse effects of climate change*), the organisations recommended to include a range of approaches to address actual and potential human mobility linked to extreme weather and gradual climatic processes. They recommended for example to give appropriate consideration to the needs of people who have moved, as well as to those who have remained in their region or origin, including those which are unable to move. Furthermore, human mobility could be addressed by establishing a special window under the Green Climate Fund to fund appropriate migration-related measures, as outlined in paragraph 14(f) of the Cancun Adaptation Framework¹⁰⁰⁵. One of the goals of the SBI Work Programme, that is, to promote the prevention and minimization of loss and damage, refers to disaster risk management and reduction, which is incorporated in the Cancun Adaptation Framework along with the migration paragraph. This would for example include measures to prevent forced climate displacement¹⁰⁰⁶. The UNU, supported by the UNHCR, furthermore recommended to support

¹⁰⁰³ UNFCCC, Submission on 'Human Mobility in the Context of Loss and Damage from Climate Change: Needs, Gaps, and Roles of the Convention in Addressing Loss and Damage', Joint Submission by the United Nations High Commissioner for Refugees (UNHCR), UN University (UNU), the Norwegian Refugee Council (NRC) and its Internal Displacement Monitoring Centre (IDMC), the Special Rapporteur on the Human Rights of Internally Displaced Persons and the International Organisation for Migration (IOM) to the SBI Work Programme on Loss and Damage, 19 October 2012, p. 5.

¹⁰⁰⁴ K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 26.

¹⁰⁰⁵ UNFCCC, Submission on 'Human Mobility in the Context of Loss and Damage from Climate Change: Needs, Gaps, and Roles of the Convention in Addressing Loss and Damage', Joint Submission by the United Nations High Commissioner for Refugees (UNHCR), UN University (UNU), the Norwegian Refugee Council (NRC) and its Internal Displacement Monitoring Centre (IDMC), the Special Rapporteur on the Human Rights of Internally Displaced Persons and the International Organisation for Migration (IOM) to the SBI Work Programme on Loss and Damage, 19 October 2012, p. 6.

¹⁰⁰⁶ UNFCCC, Paper No. 11, Submission by the United Nations University, Institute for Environment and Human Security (UNU-EHS in Bonn), 15 August 2011, Views and Information on the Thematic Areas in the Implementation of the Work Programme, Submissions from Parties and Relevant Organisations, Subsidiary Body for Implementation (SBI) at its Thirty-Fifth Session, held in Durban from 28 November to 3 December 2011, 21 September 2011, p. 36; K. Warner, 'PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change',

“disaster risk reduction and conflict mediation strategies while strengthening humanitarian responses”, in order to help states to reduce risks for the population from natural disasters and competition over scarce resources¹⁰⁰⁷.

Finally, the new Warsaw Loss and Damage Mechanisms provides a framework for activities that lead to the implementation of measures to address loss and damage (Thematic Area III of the SBI Work Programme). Warner and the UNU had already recommended for example to

“[i]dentify guiding principles, effective practices and institutional frameworks to help governments in developing appropriate laws, policies and programmes to address environmentally induced internal and international migration”¹⁰⁰⁸.

According to the UNHCR, IOM, UNU and other organisations, the COP should also “consider an international or series of regional platforms to coordinate policy and actions to address human mobility, including systematic efforts to support responses to slow-onset climatic stressors which may contribute to migration, displacement and/or the need for planned relocation of populations to safer or more habitable locations”¹⁰⁰⁹. With this aim, the UNFCCC regime should cooperate with UN

October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 27.

¹⁰⁰⁷ UNFCCC, Paper No. 11, Submission by the United Nations University, Institute for Environment and Human Security (UNU-EHS in Bonn), 15 August 2011, Views and Information on the Thematic Areas in the Implementation of the Work Programme, Submissions from Parties and Relevant Organisations, Subsidiary Body for Implementation (SBI) at its Thirty-Fifth Session, held in Durban from 28 November to 3 December 2011, 21 September 2011, p. 36; UNFCCC, Paper No. 2, Submission by the United Nations High Commissioner for Refugees (UNHCR), 11 November 2011, Views and Information on the Thematic Areas in the Implementation of the Work Programme, Submissions from Parties and Relevant Organisations, Subsidiary Body for Implementation (SBI) at its Thirty-Fifth Session, held in Durban from 28 November to 3 December 2011, 14 November 2011, p. 6.

¹⁰⁰⁸ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 27-28; UNFCCC, Paper No. 11, Submission by the United Nations University, Institute for Environment and Human Security (UNU-EHS in Bonn), 15 August 2011, Views and Information on the Thematic Areas in the Implementation of the Work Programme, Submissions from Parties and Relevant Organisations, Subsidiary Body for Implementation (SBI) at its Thirty-Fifth Session, held in Durban from 28 November to 3 December 2011, 21 September 2011, p. 37.

¹⁰⁰⁹ UNFCCC, Submission on ‘Human Mobility in the Context of Loss and Damage from Climate Change: Needs, Gaps, and Roles of the Convention in Addressing Loss and Damage’, Joint Submission by the United Nations High Commissioner for Refugees (UNHCR), UN University (UNU), the Norwegian Refugee Council (NRC) and its Internal Displacement Monitoring Centre (IDMC), the Special Rapporteur on the Human Rights of Internally Displaced Persons and the International Organisation for Migration (IOM) to the SBI Work Programme on Loss and Damage, 19 October 2012, p. 6.

and other international organisations addressing migration, as well as with other UN Conventions, such as the CBD and the UNCCD¹⁰¹⁰.

In sum, the UNFCCC regime clearly has an important role to play in facilitating the assessment of human mobility as loss and damage associated with the adverse effects of climate change, and in facilitating activities that address climate-induced migration, displacement and planned relocation. Now that the Warsaw Loss and Damage Mechanism has been established, it is important to take the step forward from knowledge to action on loss and damage associated with the adverse effects of climate change. Following the recommendations of the SBI in the months leading to the Doha negotiations, the COP acknowledged the further work to advance the understanding of and expertise on loss and damage, including understanding of “how impacts of climate change are affecting patterns of migration, displacement and human mobility”¹⁰¹¹. However, the draft conclusions proposed by the SBI Chair had also proposed to organise an expert workshop on human mobility, displacement and migration in the context of loss and damage, with the aim of “understanding how impacts of climate change are affecting patterns of migration and displacement through the Nairobi Work Programme”¹⁰¹². Unfortunately, this proposal was not withheld by the COP in Doha.

Furthermore, in a very similar way as in the Cancun Adaptation Framework, the COP invited

“all Parties, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances to enhance action on addressing loss and damage associated with the adverse effects of climate change”¹⁰¹³.

¹⁰¹⁰ UNFCCC, Submission on ‘Human Mobility in the Context of Loss and Damage from Climate Change: Needs, Gaps, and Roles of the Convention in Addressing Loss and Damage’, Joint Submission by the United Nations High Commissioner for Refugees (UNHCR), UN University (UNU), the Norwegian Refugee Council (NRC) and its Internal Displacement Monitoring Centre (IDMC), the Special Rapporteur on the Human Rights of Internally Displaced Persons and the International Organisation for Migration (IOM) to the SBI Work Programme on Loss and Damage, 19 October 2012, p. 6.

¹⁰¹¹ UNFCCC, Decision 3/CP.18 on ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’, adopted at the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012, FCCC/CP/2012/8/Add.1, 28 February 2013, §7(a)(vi).

¹⁰¹² UNFCCC, ‘Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity’, Draft Conclusions proposed by the Chair, Subsidiary Body for Implementation (SBI) at its Thirty-Seventh Session, held in Doha from 26 November to 1 December 2012, FCCC/SBI/2012/L.44, 1 December 2012, §6(i).

¹⁰¹³ UNFCCC, Decision 3/CP.18 on ‘Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity’, adopted at the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012, FCCC/CP/2012/8/Add.1, 28 February 2013, § 6.

However, in the list of measures that follows to this invitation, migration, displacement nor planned relocation were incorporated. Mainly through the discussions on loss and damage, COP18 in Doha represented an opportunity to further advance the issue of migration, displacement and planned relocation in the climate change negotiations¹⁰¹⁴. Unfortunately, COP18 missed this important opportunity to further consolidate paragraph 14(f) of the Cancun Adaptation Framework and to secure the issue of climate-induced human mobility within the UNFCCC loss and damage mechanism. It would have been better to have incorporated the issue of climate-induced migration into paragraph 6 instead of paragraph 7 of Decision 3/CP.18 on loss and damage. Similarly, at COP19, migration was not incorporated into Decision 2/CP.19 on the Warsaw International Mechanism. It thus seems that the issue of climate-induced migration was not as strong a priority as it was in the discussion on the Cancun Adaptation Framework.

Nonetheless, as the Warsaw Loss and Damage Mechanism was established under the Cancun Adaptation Framework, paragraph 14(f) of the Cancun Agreements cannot be ignored in the further discussions on loss and damage associated with the adverse effects of climate change. Furthermore, some important issues for the loss and damage-framework seem to have been partly resolved, such as the lack of clarity about the terms ‘loss and damage’ (for example: is loss and damage part of adaptation action, or is it rather a “third paradigm” next to mitigation and adaptation?), and the way to institutionalise loss and damage more formally.

The issue of loss and damage has only just started to come up in the international climate negotiations. However, even though the discussions around loss and damage are still in their infancy, they will gain more importance in the future. Where paragraph 14(f) of the Cancun Adaptation Framework signalled the first step of addressing climate-induced human mobility in the UNFCCC regime, the loss and damage-paradigm could perhaps provide another useful avenue for the topic in the future.

3.3. Proposals for an additional protocol to the UNFCCC: a critical discussion

In their search for legal responses to the issue of climate-induced migration and displacement, some scholars argue for the adoption of an additional protocol to the UNFCCC, specifically addressing

¹⁰¹⁴ C. Mair, ‘Climate Displacement and Migration, Loss and Damage, and the Journey Forward’, Report of the Foundation for International Environmental Law and Development (FIELD), London, November 2012, p. 5-7.

climate-induced human mobility. For example, Biermann and Boas argue for a “UNFCCC Protocol on the Recognition, Protection and Resettlement of Climate Refugees”¹⁰¹⁵, while Williams suggests regional agreements, operating under the umbrella of the UNFCCC¹⁰¹⁶. This Section briefly describes some of these proposals, and offers some comparative critiques.

As existing institutional frameworks would not be sufficiently equipped to deal with climate-induced migration, Frank Biermann and Ingrid Boas propose a new legal instrument specifically adapted to the needs of “climate refugees”¹⁰¹⁷, and drawing on widely agreed principles such as the principle of common but differentiated responsibilities and the polluter pays-principle¹⁰¹⁸. They have presented a blueprint for a “Protocol on the Recognition, Protection and Resettlement of Climate Refugees to the United Nations Framework Convention on Climate Change”, operating under 5 main principles: firstly, the objective would be the planned and voluntary resettlement and reintegration of affected populations, as opposed to mere emergency responses in displacement situations (“Principle of Planned Re-location and Resettlement”). This climate refugee regime would furthermore treat climate refugees as permanent immigrants in accepting regions or countries (“Principle of Resettlement Instead of Temporary Asylum”), and is specifically tailored to the needs of entire groups of people, instead of individuals, as in the 1951 Refugee Convention (“Principle of Collective Rights for Local Populations”). The blueprint furthermore focuses on the internal resettlement of climate refugees, albeit with international assistance and funding (“Principle of International Assistance for Domestic Measures”). Finally, the protection of climate refugees is regarded as a

¹⁰¹⁵ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf; F.

Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at:

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 8.

¹⁰¹⁶ A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008.

¹⁰¹⁷ As discussed in PART I of this thesis, Biermann and Boas prefer to use the term “climate refugee”, as they see no reason “to invent less appropriate terms” for forcibly displaced persons due to climate events than for those falling under the 1951 Geneva Convention. See for further argumentation: F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at: <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 4; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 66-67.

¹⁰¹⁸ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at:

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 3-6.

matter of global responsibility, since climate change is mainly caused by the industrialised world (“Principle of International Burden-sharing”)¹⁰¹⁹.

Applying these principles, Biermann and Boas have come up with a governance mechanism based upon a list of specified administrative areas where the population is in need of or at risk of relocation due to climate change. State Parties to the protocol would be entitled to propose areas under their jurisdiction to be included in this list, while an Executive Committee, functioning under the authority of the meeting of the parties, would decide on the inclusion of affected areas. This Executive Committee, composed of an equal number of affected countries and donor countries, would also determine the types of support measures for affected areas, which could include financial support, inclusion in long-term voluntary resettlement programmes together with the purchase of new land, retraining and integration programmes, or even organised international migration where needed¹⁰²⁰. These rights would be restricted to the inhabitants of developing countries, namely to non-Annex I countries¹⁰²¹.

In order to provide this resettlement regime with the necessary financial means, Biermann and Boas propose to integrate a separate fund into the protocol, called the “Climate Refugee Protection and Resettlement Fund”¹⁰²². While this Fund would be linked to other existing funding mechanisms for operational aspects, it would be governed independently, standing under the authority of the meeting of the parties to the protocol. The financial means for the fund would come from novel income-raising mechanisms, such as an international air-travel levy, based on the principle of

¹⁰¹⁹ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 75-76.

¹⁰²⁰ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at:

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 4; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 76-78.

¹⁰²¹ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at:

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 5; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 78.

¹⁰²² F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at:

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 5.

reimbursement of full incremental costs by industrialised countries having caused global warming¹⁰²³. The implementation of the protocol would be mandated to a network of agencies, with a crucial role for the UNDP and the World Bank, assisted by UNEP, UNHCR, and a small coordinating secretariat¹⁰²⁴.

According to Biermann and Boas, this climate refugee regime could help climate refugees “by linking their protection with the overall climate regime”¹⁰²⁵. They even suggest that such a protocol on the protection of climate refugees “could become for developing countries a major bargaining chip in negotiations”, as they are increasingly pressured by developed countries to be integrated in a global mitigation regime¹⁰²⁶.

However, it would be up to the Executive Committee to decide to recognise the population of a certain area as “climate refugees” and to grant them the support provided by the protocol. As decisions of this Committee would have to be taken by double-weighted majority, donor countries would have a veto right, making the decision to grant rights to climate refugees a political decision. It seems doubtful that this would be an effective procedure for a protection regime. As discussed in PART I of this thesis, a too political recognition procedure is exactly the reason why the European Temporary Protection Directive has no relevance in practice (*see Chapter III, Section 2.2.2.*). Furthermore, Biermann and Boas’ Protocol has been criticised for its “rather static view of climate-society relationships”¹⁰²⁷. Indeed, Biermann and Boas explicitly propose to treat climate refugees as

¹⁰²³ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at: <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 5; F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at: http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 81-82.

¹⁰²⁴ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at: <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 5.

¹⁰²⁵ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at: <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 3.

¹⁰²⁶ F. Biermann and I. Boas, ‘Protecting Climate Refugees: the Case for a Global Protocol’, *Environment*, November/December 2008, available at: <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>, p. 3.

¹⁰²⁷ M. Hulme, ‘Commentary – Climate Refugees: Cause for a New Agreement?’, *Environment*, November/December 2008, available at: <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/hulme-full.html>, p. 1.

“permanent immigrants”, thereby implying that they cannot return home¹⁰²⁸. However, as has been shown in PART I of this thesis, environment-induced migration should not always be seen as permanent or irreversible *per se*. Programmes of circular and temporary labour migration have been recognised as contributing to the adaptation of vulnerable communities in the face of recurring natural disasters¹⁰²⁹, while return migration could be a viable strategy for communities affected by slow-onset environmental degradation as well¹⁰³⁰.

Another concern regards the issue of causality. According to Hulme, Biermann and Boas’ use of the term “climate refugee” implies a monocausality between migration and climate change, while a decision to migrate depends upon a myriad of economic, political, environmental and social factors. He argues that, for the Protocol to be operational, it is necessary to give a clear definition of who is a “climate refugee”, and who is not, which would, according to Hulme, be impossible to determine¹⁰³¹. Despite the issue of causality being an interesting and important one to tackle, I believe this difference of opinion passes by the reality of climate-induced migration and the need to protect climate-induced migrants and displaced persons. Even though a decision to migrate is always a result of multiple push and pull factors, this has not been a reason not to protect refugees fleeing persecution or war victims fleeing a situation of armed conflict. Policymakers have thus in the past succeeded to define persons in need of international protection in legal instruments by determining a certain threshold for protection, and there seems to be no reason why the same cannot be done for people fleeing situations of severe environmental disruption. In fact, a list of specified areas where the population is at risk of displacement, as suggested by Biermann and Boas, could indeed help governments to treat asylum applications from climate-induced displaced persons, and would resolve the problem of causality in individual cases¹⁰³². However, in order to safeguard the rights of every individual applicant, such a list should, in my opinion, only include a non-exhaustive enumeration of areas at risk.

¹⁰²⁸ F. Biermann and I. Boas, ‘Preparing for a Warmer World. Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33, The Global Governance Project, Amsterdam, November 2007, available at:

http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf, p. 75.

¹⁰²⁹ See for example the Temporary and Circular Labour Migration Programme (TCLM) between Colombia and Spain, as discussed in PART I, Chapter II of this study.

¹⁰³⁰ See for example the return programme towards Niger, as discussed in PART I, Chapter I of this study.

¹⁰³¹ M. Hulme, ‘Commentary – Climate Refugees: Cause for a New Agreement?’, *Environment*, November/December 2008, available at:

<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/hulme-full.html>, p. 1.

¹⁰³² M. Gromilova, ‘The Issue of Climate-Induced Displacement from the Perspective of International Environmental Law’, Thesis submitted to the Tilburg University in partial fulfilment of the requirements for the degree Research Masters in Law, under supervision of Prof. J.M. Verschuuren, 28 June 2012, available at: <http://arno.uvt.nl/show.cgi?fid=122940>, p. 27-28.

In order to fill the protection gap for climate-induced displaced persons, Angela Williams on the other hand suggests a regionally-oriented regime operating under the auspices of the UNFCCC. According to Williams, the solution for the protection of climate-induced displaced persons lies not in a new international agreement providing a framework for protection, as this “cuts to the very heart of state sovereignty and thus would likely prove a contentious issue upon which to achieve universal (...) agreement”¹⁰³³. After having unsuccessfully attempted to introduce a new category of climate-induced displaced persons into existing frameworks, she therefore calls for an alternative system by way of a regional agreement, operating under an international umbrella framework.

According to Williams, regional cooperation and bilateral agreements have more chance to success, as they build on existing political and economic relationships, and are thus more likely to achieve a greater level of commitment by participating states. Moreover, the most immediate impacts of climate-induced migration and displacement will indeed be felt at the regional level, as persons fleeing climate change effects seek new homes into neighbouring countries. A governance system recognising the existence of climate-induced displacement at the international level, while leaving more detailed agreements to the regional level, would thus be better suited to deal with climate-induced human mobility¹⁰³⁴.

Williams successfully argues that the UNFCCC is the appropriate international framework to host such a regionally-oriented programme, as the Convention already promotes regional policy development, more in particular in the field of adaptation strategies¹⁰³⁵. Pre-existing regional associations, such as the EU or the African Union (AU), could then offer the necessary regional frameworks to develop more detailed plans of action or agreements to deal with climate-induced displacement in the particular region. A subsidiary body within the UNFCCC regime could offer institutional support for the coordination of regional initiatives, and could facilitate the exchange of information and the interaction between different regional organisations¹⁰³⁶.

However, we have to keep in mind that, just as the proposal of Biermann and Boas, the alternative proposed by Williams has been developed before the adoption of the Cancun Agreements. Williams argues for example for “an explicit recognition of so-called climate change refugees in the post-Kyoto

¹⁰³³ A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 517-518.

¹⁰³⁴ A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 518-520.

¹⁰³⁵ A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 519-520.

¹⁰³⁶ A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 520-521.

agreement that allows for, and facilitates, the development of regional programs to address the problem”¹⁰³⁷. In a way, it can be said that this was already achieved through the adoption of paragraph 14(f) of the Cancun Agreements, which invites states to take measures regarding climate-induced migration, displacement and planned relocation at the regional level. Of course, the aim is to go further than that, and it is to be hoped that climate-induced human mobility will also find its place in the new legal instrument that is being debated at this moment in the climate negotiations.

Another interesting protocol-based proposal is the one made by Brendan Gogarty, who, after the adoption of the Cancun Agreements, goes further than the two previous proposals, by providing more concrete suggestions on how a new UNFCCC protocol on migration and displacement could look like. He first thoroughly explains why the UNFCCC regime is the appropriate legal framework to host a new and specific instrument on climate-induced displacement. As the Cancun Agreements already recognise migration and displacement as part of adaptation strategies under the Convention, the UNFCCC regime has now the potential to support more concrete provisions on climate-induced displacement. Furthermore, a new convention on climate-induced displacement, outside of an existing legal framework, would complicate the harmonisation of international law, and create conflicts between varying legal instruments offering differing protection standards. The UNFCCC framework is an important and already existing multilateral regime on climate change, supported by an existing funding and technology transfer mechanism facilitating adaptation strategies, as well as a wide range of specialist bodies and cooperating UN organisations, which could help to implement concrete provisions on migration and displacement¹⁰³⁸. In addition, the precautionary approach, confirmed in Article 3(3) UNFCCC, does not demand full scientific certainty to address climate-induced human mobility, contrary to other legal models, which would probably demand a higher threshold to be met before protecting climate-induced displaced persons¹⁰³⁹. Importantly, the

¹⁰³⁷ A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, 30 *Law & Policy* 4, 2008, p. 502.

¹⁰³⁸ B. Gogarty, ‘Climate-Change Displacement: Current Legal Solutions to Future Global Problems’, 21 *Journal of Law, Information and Science* 1, 2011, p. 16-19.

¹⁰³⁹ B. Gogarty, ‘Climate-Change Displacement: Current Legal Solutions to Future Global Problems’, 21 *Journal of Law, Information and Science* 1, 2011, p. 17-18. For proposal for a new convention on climate/environmental change-displaced persons, see for example: B. Docherty and T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, 33 *Harvard Environmental Law Review* 2, 2009; D. Hodgkinson, T. Burton, H. Anderson and L. Young, ‘The Hour when the Ship Comes in’: A Convention for Persons Displaced by Climate Change’, The Hodgkinson Group, January 2010, available at: http://www.ccdpconvention.com/documents/Hour_When_Ship_Comes_In.pdf.

UNFCCC regime already has both the capacity and the support of the international community to address climate-induced migration and displacement¹⁰⁴⁰.

Inspired by the regional approach of Williams' proposal, Gogarty then recommends to create a new framework on migration and displacement as an adjunct to the adaptation work under the existing Framework Convention, either through a series of regionally based protocols to the UNFCCC, or by an additional multi-state protocol. Such protocols could then:

- *“Establish a new coordinating body for migration and displacement within the UNFCCC framework or expand the mandate of the (...) existing bodies;*
- *Provide funding, support, modelling data and for anticipatory, managed displacement within countries as an adaptation device via National Adaptation Plans;*
- *Support the role of cluster oversight organisations such as UN-OCHA for climate-change induced rapid onset disasters;*
- *Act as a cluster for existing UN Organisations with a role in climate-change risk resilience;*
- *Provide a platform for the re-affirmation of the Guiding Principles [on Internal Displacement] as a component of state practice and work with UNHCR and UNEP to expand the principles to cover perceived gaps relating to long-term environmental degradation;*
- *Provide a legal platform (via COP Agreement/regional protocol) for the affirmation of state responsibility to provide a safe haven from sudden onset disasters;*
- *Provide a mechanism (via COP Agreement/multilateral protocol) for the affirmation of and response to de-territorialised sovereign states, particularly small island developing states (SIDS);*
- *Build on, or provide funding mechanisms to purchase land and negotiation mechanisms, into agreements with sovereign states for SIDS or other countries at genuine risk of losing territory as a consequence of sea-level rises; and*
- *Permit states to enter into regional protocols to share the burden of CCDP [Climate-Change Displaced Persons] migration over the long term as an adaptation to climate-change in line with Williams' recommendations”¹⁰⁴¹.*

¹⁰⁴⁰ B. Gogarty, 'Climate-Change Displacement: Current Legal Solutions to Future Global Problems', 21 *Journal of Law, Information and Science* 1, 2011, p. 20.

Some of these concrete suggestions, such as the recommendation to create a new coordinating body within the UNFCCC or the attached importance to NAPs as instruments providing funding and assistance, are certainly valuable in the debate on a legal solution for climate-induced migrants and displaced persons. However, it is doubtful whether a legal platform could be created within the UNFCCC regime, through a COP Agreement or a UNFCCC protocol, that affirms state responsibility to “provide a safe haven from sudden onset disasters”. Indeed, UNFCCC negotiators have been willing to take up the topic of climate-induced migration within the international climate change regime, but assuming that they will touch upon the important national sovereignty area of asylum law, seems at this moment far from realistic.

From a legal point of view, the above discussed proposals suggest either a set of regionally based protocols to the UNFCCC, or an additional multi-state protocol. Such protocols differ from the previous discussed option to include migration-related provisions in COP decisions, as the one agreed upon at COP16 in Cancun. As analysed above, COP decisions cannot create substantive new and legally-binding obligations for the State Parties to the UNFCCC, and can therefore not lead to concrete state obligations regarding climate-induced human mobility. A protocol on the other hand is a legally-binding instrument, and could thus contain legally-binding, and judicially enforceable, provisions¹⁰⁴². As the UNFCCC is an “umbrella convention”, a whole range of protocols could be adopted under it, including a protocol on climate-induced mobility. Such a protocol to the UNFCCC would need to be adopted through an *ad hoc* voting procedure, or, in the absence of this, through consensus¹⁰⁴³. However, a protocol can only be binding to the State Parties which have ratified it, which might render it difficult to agree upon.

In sum, these protocol-based proposals for a new legal instrument within the international climate change regime contribute significantly to the debate on the opportunities and limitations of international environmental law towards the issue of environment-induced migration. The authors of these proposals search for the solution to the issue in the environmental law regime, as opposed to creating a new convention on environment-induced migration, outside of an existing legal framework. Despite their sometimes provocative suggestions, the proposed protocols also contain

¹⁰⁴¹ B. Gogarty, ‘Climate-Change Displacement: Current Legal Solutions to Future Global Problems’, 21 *Journal of Law, Information and Science* 1, 2011, p. 19-20.

¹⁰⁴² L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 810. Non-compliance would probably be dealt with within an enforcement regime created within the UNFCCC system, but could also be brought before international courts.

¹⁰⁴³ Article 17 UNFCCC. See for the adoption procedure of UNFCCC Protocols: L. Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’, 58 *International and Comparative Law Quarterly* 3, 2009, p. 811-817.

very valuable practical suggestions, such as Biermann and Boas' suggested list of areas in which the population is in need of or at risk of population relocation, or Williams' preference for a regionally-oriented regime¹⁰⁴⁴.

The UNFCCC regime has the advantage of already enjoying extensive state support, functions under a well-established institutional regime and has an important funding mechanism for adaptation activities¹⁰⁴⁵. Furthermore, it divides state responsibilities according to the principle of common but differentiated responsibilities. In a world where states are reluctant to commit themselves in new international legal frameworks creating new regulatory and financial burdens, it is more likely that they will accept migration provisions in the UNFCCC regime than in a new *sui generis* international convention.

However, although there is a strong potential for the UNFCCC regime to create a new instrument protecting climate change-induced migrants, it also has serious shortcomings. Firstly, the UNFCCC regime can only address climate change-induced migration, leaving other environmental push factors for migration aside. In addition, it is difficult, if not impossible, to impose state obligations regarding international migration through instruments of international environmental law. Asylum and migration legislation remain important matters of national sovereignty, and can be better approached through bilateral or regional migration agreements than through an international legal regime such as the UNFCCC framework. So even though the UNFCCC regime is an important legal framework, for the prevention of environment-induced migration as well as through its increased attention for the issue, it seems that it may not be the most appropriate legal regime for the legal recognition and protection of environment-induced migrants and displaced persons¹⁰⁴⁶. Other legislative areas, such as national and regional migration law, thus deserve further attention (*see PART III of this study*).

¹⁰⁴⁴ M. Gromilova, 'The Issue of Climate-Induced Displacement from the Perspective of International Environmental Law', Thesis submitted to the Tilburg University in partial fulfilment of the requirements for the degree Research Masters in Law, under supervision of Prof. J.M. Verschuuren, 28 June 2012, available at: <http://arno.uvt.nl/show.cgi?fid=122940>, p. 27-28.

¹⁰⁴⁵ M. Gromilova, 'The Issue of Climate-Induced Displacement from the Perspective of International Environmental Law', Thesis submitted to the Tilburg University in partial fulfilment of the requirements for the degree Research Masters in Law, under supervision of Prof. J.M. Verschuuren, 28 June 2012, available at: <http://arno.uvt.nl/show.cgi?fid=122940>, p. 27.

¹⁰⁴⁶ See also: E.T. Litwin, 'The Climate Diaspora: Indo-Pacific Emigration from Small Island Developing States', Thesis submitted to the McCormack Graduate School of Policy and Global Studies, International Relations Masters Program, University of Massachusetts, May 2011, p. 46; B. Docherty and T. Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees', 33 *Harvard Environmental Law Review* 2, 2009, p. 350, 358-359, 394-397.

Chapter V. Other branches of international environmental law

1. THE UN CONVENTION TO COMBAT DESERTIFICATION

1.1. Combating desertification, land degradation and drought

At the Rio Earth Summit of 1992, desertification was, together with climate change and the loss of biodiversity, recognised as one of the challenges to sustainable development. In 1994, the UNCCD¹⁰⁴⁷ was adopted, with the objective

“to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas”¹⁰⁴⁸.

For the purpose of the Convention, ‘desertification’ means “land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities”¹⁰⁴⁹. Drylands host some of the most vulnerable ecosystems and populations worldwide. The UNCCD addresses these drylands, and aims “to forge a global partnership to reverse and prevent desertification/land degradation and to mitigate the effects of drought in affected areas in order to support poverty reduction and environmental sustainability”¹⁰⁵⁰.

¹⁰⁴⁷ United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), adopted on 17 June 1994, entered into force on 26 December 1996, 1954 *UNTS* 3 (hereafter: UN Convention to Combat Desertification).

¹⁰⁴⁸ Article 2(1) of the UN Convention to Combat Desertification.

¹⁰⁴⁹ Article 1(a) of the UN Convention to Combat Desertification.

¹⁰⁵⁰ UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007, p. 16.

Similar to the UNFCCC regime, the UNCCD established the Conference of the Parties (COP) as its supreme decision-making body, with the authority to adopt decisions necessary to promote the effective implementation of the Convention¹⁰⁵¹. Furthermore, a Permanent Secretariat was established¹⁰⁵², and two subsidiary bodies were created, namely the Committee on Science and Technology (CST) and the Committee for the Review of the Implementation of the Convention (CRIC). In 2007, a Ten-Year Strategy was developed, in order to enhance the implementation of the Convention¹⁰⁵³. It includes important strategic objectives to guide the actions of all stakeholders and partners in the period 2008 - 2018, and defines the focus areas of both subsidiary bodies for this period.

From the three new forums addressing environmental issues initiated in Rio, the UNFCCC regime as well as the CBD are the result of a negotiation process between developed and developing nations, while the UNCCD clearly originates from political processes in the South. The UNCCD addresses an environmental process which is often not even considered to be an international problem by the developed world, and has therefore even been described as the “Rio stepchild”¹⁰⁵⁴. It has received much less attention and support than the two other environmental forums. Perhaps this is one of the reasons why migration is, in contrast to the other two Rio conventions, mentioned as a particular concern in the UNCCD.

1.2. Migration and displacement in the UNCCD regime

1.2.1. Human mobility due to desertification, land degradation and drought

As shown in Chapter I of this study, desertification, land degradation and droughts have serious implications on human migration and displacement. Due to the impact of both climate change and

¹⁰⁵¹ Article 22 of the UN Convention to Combat Desertification.

¹⁰⁵² Article 23 of the UN Convention to Combat Desertification.

¹⁰⁵³ UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007.

¹⁰⁵⁴ P. Galizzi and A. Herklotz, ‘Environment and development: friends or foes in the 21st century?’ in M. Fitzmaurice, D.M. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing, Cheltenham, 2010, p. 80-81.

land degradation resulting from erosion, salinisation or a decline in soil nutrients, drylands suffer from a decrease of productivity and reliability of agricultural and pastoral systems. As a result, it is expected that vulnerable areas in Sub-Saharan Africa, Central Asia and around the Mediterranean will see significant changes in traditional migration patterns¹⁰⁵⁵.

Desertification- and drought-induced human mobility can take different forms. When the inhabitants of vulnerable drylands have no other option than to flee their degrading region of origin, they become environmentally-displaced persons. In a discussion paper from the UNCCD Secretariat, migration is also mentioned as an important adaptation strategy to sustain livelihoods of affected dryland populations. Among other benefits, the Secretariat underlines that out-migration could alleviate demographic burden and allow degraded environments to recuperate. Moreover, returned migrants could import know-how on innovate land use methods, or bring new skills to diversify their livelihoods, thereby reducing their reliance on natural resources¹⁰⁵⁶.

This Section aims to assess whether and how the UNCCD regime could contribute in the search for durable legal solutions to address the issue of environment-induced migration, and more in particular to support international migration as a strategy to adapt to degrading environmental conditions.

1.2.2. Addressing migration and displacement in the UNCCD

Unlike the UNFCCC and the CBD (*see further below in Section 3*), which do not explicitly refer to the phenomenon of climate- or environment-induced migration, the UNCCD pays modest attention to human mobility. In the prologue of the Convention, the Parties are

“Mindful that desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and nutrition, lack of

¹⁰⁵⁵ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 68, 71-74.

¹⁰⁵⁶ UNCCD Policy Brief on Migration, ‘Managing environmentally-induced migration in drylands: The Win-Win Strategy’, Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 8.

food security, and those arising from *migration, displacement of persons* and demographic dynamics”¹⁰⁵⁷ [Emphasis added] .

More in particular, mechanisms to assist environmentally-displaced persons are mentioned in the Convention as measures to prepare for and mitigate the effects of drought. In order to implement the Convention, affected countries are required to develop National Action Programmes (NAPs), with the aim “to identify the factors contributing to desertification and practical measures necessary to combat desertification and mitigate the effects of drought”¹⁰⁵⁸. Often supported by action programmes at the sub-regional (SRAP) and regional (RAP) level, such NAPs are important instruments to achieve the Convention’s goals. They are developed through a participatory process involving governmental offices, scientific institutions and local communities. According to Article 10 of the Convention,

“National action programmes may include, inter alia, some or all of the following measures to prepare for and mitigate the effects of drought: (a) establishment and/or strengthening, as appropriate, of early warning systems ... and mechanisms for assisting *environmentally displaced persons*”¹⁰⁵⁹. [Emphasis added]

Finally, Article 17 of the Convention, on research and development, states that

“The Parties undertake, according to their respective capabilities, to promote technical and scientific cooperation in the fields of combating desertification and mitigating the effects of drought through appropriate national, subregional, regional and international institutions. To this end, they shall support research activities that

...

(e) take into account, where relevant, the relationship between poverty, *migration caused by environmental factors*, and desertification”¹⁰⁶⁰. [emphasis added]

With these provisions, the drafters of the UNCCD clearly recognised the causal relationship between drought, desertification and human mobility. However, compared to the way in which migration was addressed in the UNFCCC regime, the provisions above seem to use the relevant terms ‘migration’ and ‘displacement’ more indiscriminately. Unlike paragraph 14(f) of the Cancun Agreements, which refers to ‘migration’, ‘displacement’ and ‘planned relocation’, the UNCCD mentions *migration* when

¹⁰⁵⁷ Prologue of the UN Convention to Combat Desertification.

¹⁰⁵⁸ Article 9 and 10 of the UN Convention to Combat Desertification.

¹⁰⁵⁹ Article 10(3)(a) of the UN Convention to Combat Desertification.

¹⁰⁶⁰ Article 17(e) of the UN Convention to Combat Desertification.

addressing research and development, while referring to environmentally-*displaced* persons in the article regarding National Action Programmes (NAPs).

It seems that the use of terminology on human mobility has been less thought-out in the UNCCD than in the UNFCCC Cancun Agreements. Indeed, the UNCCD provisions go back years before the terminology discussion broke out in the context of the UNFCCC climate negotiations leading to COP16 in Cancun. The choice to use 'migration' or 'displacement' in a particular context in the text of the Convention was not a conscious choice. Similarly, the lack of an explicit reference to migration as an adaptation strategy should not be misconstrued, as the UNCCD is older than the discussion on the concept of migration as an adaptive strategy. It was only later that the word 'migration' came to mean a proactive form of human mobility in the context of migration and environmental change.

1.2.3. Legal value of migration provisions in the UNCCD regime

As a multilateral environmental agreement, the UNCCD can be considered as a hard law source of international law, as enumerated in Article 38 of the ICJ Statute¹⁰⁶¹. As a result, its provisions, including those concerning migration and displacement, are binding to the State Parties to the Convention. However, as discussed above (*see Chapter IV, Section 2.3.2.*), hard law instruments can also include 'soft' provisions, for example when they are phrased in an insufficiently clear way to hold State Parties to a precise obligation¹⁰⁶². Such 'legal soft law' merely proposes certain guidelines for state conduct, but does not impose strict state obligations¹⁰⁶³. The legal value of the UNCCD migration provisions is thus not only determined by the form of the document, but also by the legal character of its substance.

Taking a closer look at Article 10 of the Convention, it turns out that the level of obligation contained in the language of this provision on National Action Programmes is relatively low. NAPs "*may include*" mechanisms for assisting environmentally-displaced persons¹⁰⁶⁴, but states are not obliged to incorporate such measures into their NAPs. This provision regarding environment-induced migration in the UNCCD regime thus seems to be a form of 'legal soft law', as it is formulated as an

¹⁰⁶¹ Article 38, Statute of the International Court of Justice, adopted in San Francisco on 26 June 1948.

¹⁰⁶² A. Wiersema, 'The New International Law-Makers? Conferences of the parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law*, 2009, p. 260.

¹⁰⁶³ P.-M. Dupuy, 'Soft Law and the International Law of the Environment', 12 *Michigan Journal of International Law* 2, 1991, p. 428-430.

¹⁰⁶⁴ Article 10(3)(a) of the UN Convention to Combat Desertification.

encouragement rather than an obligation. On the other hand, Article 17 UNCCD on research and development seems to contain more hard law terminology, as it prescribes that the Parties to the Convention “*shall* support research activities that (e) take into account, where relevant, the relationship between poverty, migration caused by environmental factors, and desertification”¹⁰⁶⁵. However, the vagueness and indeterminacy of this commitment also gives it a rather ‘soft’ character. So even though these norms are contained in a legally-binding hard law instrument, it seems difficult to attach strict and enforceable state obligations regarding migration and displacement to them.

Nonetheless, as mentioned above, a status of legal soft law is not always without any legal and political significance. What matters, is whether and how these migration provisions are effectively implemented in practice.

1.2.4. Implementation mechanisms and funding

One of the main barriers that have hindered the battle to combat desertification, drought and land degradation, has been identified as the lack of effective management and implementation mechanisms¹⁰⁶⁶. Just as the UNFCCC regime, the UNCCD regime is equipped with a number of implementation mechanisms, in order to translate the Convention’s goals into concrete actions on the ground.

1.2.4.1. National Action Programmes (NAPs)

A. Mainstreaming human mobility in the UNCCD’s NAPs

As mentioned above, the UNCCD requires affected State Parties to develop NAPs, with the aim “to identify the factors contributing to desertification and practical measures necessary to combat

¹⁰⁶⁵ Article 17(e) of the UN Convention to Combat Desertification.

¹⁰⁶⁶ Z. Adeel et al., ‘Overcoming one of the greatest environmental challenges of our times: Re-thinking policies to cope with desertification’, Policy brief based on the Joint International Conference: “Desertification and the international Policy Imperative” (2006), organized in Algiers, Algeria, 17-19 December 2006, available at: <http://inweh.unu.edu/wp-content/uploads/2013/05/Re-thinkingPoliciesToCopeWithDesertification.pdf>.

desertification and mitigate the effects of drought”¹⁰⁶⁷. According to Article 10 of the Convention, NAPs may include “mechanisms for assisting environmentally displaced persons” as measures to prepare for and mitigate the effects of drought. Considering the above described incorporation of environment-induced migration into the UNCCD itself, the question now rises to what extent the Convention’s national implementation mechanisms are addressing this issue.

Since the adoption of the Ten Year-Strategy in 2007, countries are required to align their NAPs to the Strategy’s objectives, which many affected countries started to do indeed. Unfortunately, environment-induced migration is not explicitly addressed in the Ten Year-Strategy. However, according to the UNCCD Secretariat’s Policy Brief on Migration, the issue seems to be covered through the Strategy’s strategic and operational objectives, which are expected to guide the actions of all UNCCD stakeholders and partners in the period 2008–2018. The first of the strategic objectives is “to improve the living conditions of affected populations” in drylands¹⁰⁶⁸. Concrete expected outcomes are portrayed under Operational Objective 2, which requires the creation of a policy framework “for promoting solutions to combat desertification/land degradation and mitigate the effects of drought”¹⁰⁶⁹. To this end, affected countries should take biophysical as well as socio-economic information into account in their NAPs, and integrate these NAPs and sustainable land management and land degradation issues into development planning¹⁰⁷⁰. For the issue of environment-induced migration, it is interesting to investigate whether migration is addressed in the NAPs as a way to improve the living conditions of affected populations, or as a solution to combat desertification/land degradation and mitigate the effects of drought.

In most NAPs, human mobility is mentioned in the situation analysis that precedes concrete objectives, outputs and activities of the NAP to combat desertification. Most often, migration to urban areas is seen as a problem, namely as a negative consequence of droughts and

¹⁰⁶⁷ Article 9 and 10 of the UN Convention to Combat Desertification.

¹⁰⁶⁸ UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007, p. 9.

¹⁰⁶⁹ UNCCD Policy Brief on Migration, ‘Managing environmentally-induced migration in drylands: The Win-Win Strategy’, Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 4; UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007, p. 11.

¹⁰⁷⁰ UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007, p. 11.

desertification¹⁰⁷¹, or even as a cause of environmental problems¹⁰⁷². In the NAP of Botswana for instance, rural-urban migration is seen as a problem that should be addressed in national economic and environmental policies¹⁰⁷³, while in the NAP of Burkina Faso, the disordered settlement of migrating populations is considered to be destructive for the natural resources of the new environment¹⁰⁷⁴.

However, in the NAPs which do refer to migration in their objectives and proposed activities to combat desertification, the issue is sometimes treated in a relatively novel way, at least in comparison to the treatment of the issue in the NAPA process in the framework of the UNFCCC. For instance in the NAP of Burkina Faso, the competent Minister of Environment and Water mentions that migration should be organised in order to provide jobs for people who can no longer gain a livelihood from the natural resources of their environment¹⁰⁷⁵. In the country's action programme concerning the improvement of living conditions for rural and semi-urban populations, one of the objectives is to "define and implement policies on population and migration, in order to reduce demographic pressure on land"¹⁰⁷⁶. This way, income resources of rural populations could be

¹⁰⁷¹ See for example *Le Programme d'Action National de Lutte Contre la Désertification de Cap Vert*, 2000, available at : http://www.unccd.int/ActionProgrammes/cape_verde-fre2000.pdf, p. 11, 21; *Egyptian National Action Program To Combat Desertification*, Ministry of Agriculture and Land Reclamation, Desert Research Center (DRC), June 2005, available at : <http://www.unccd.int/ActionProgrammes/egypt-eng2005.pdf>, p. 32, 38; *National Action Programme To Combat Desertification (NAP) of The Gambia*, November 2000, available at: <http://www.unccd.int/ActionProgrammes/gambia-eng2000.pdf>, p. 27, 30, 54, 60; *National Action Programme for Malawi for the United Nations Convention to Combat Desertification*, 2001, available at: <http://www.unccd.int/ActionProgrammes/malawi-eng2001.pdf>, p. 10, 22; *National Action Programme to Combat Desertification of the Federal Democratic Republic of Ethiopia*, Environmental Protection Authority, Addis Ababa, November 1998, available at: <http://www.unccd.int/ActionProgrammes/ethiopia-eng2000.pdf>, p. 9, 56-57; *National Action Plan to Combat Desertification/Land Degradation and to Mitigate against Drought*, Republic of the Fiji Islands, Compiled by the UNCCD National Focal Point, Ministry of Agriculture, Fisheries & Forests, June 2007, available at: <http://www.unccd.int/ActionProgrammes/fiji-eng2007.pdf>, p. 16; *National Action Programme to Combat Desertification in the Context of the United Nations Convention to Combat Desertification (UNCCD) of India*, Ministry of Environment and Forests, New Delhi, September 2001, available at: <http://www.unccd.int/ActionProgrammes/india-eng2001.pdf>, p. 61; *National Action Programme to Combat Desertification of Lebanon*, Ministry of Agriculture, June 2003, available at: <http://www.unccd.int/ActionProgrammes/lebanon-eng2003.pdf>, p. 5, 7, 65, 108-109, 162.

¹⁰⁷² See for example the *National Action Plan to Combat Desertification/Land Degradation and to Mitigate against Drought*, Republic of the Fiji Islands, Compiled by the UNCCD National Focal Point, Ministry of Agriculture, Fisheries & Forests, June 2007, available at: <http://www.unccd.int/ActionProgrammes/fiji-eng2007.pdf>, p. 28.

¹⁰⁷³ *Botswana National Action Programme to Combat Desertification*, Department of Environmental Affairs of the Ministry of Environment Wildlife & Tourism, October 2006, available at: <http://www.unccd.int/ActionProgrammes/botswana-eng2006.pdf>, p. 26.

¹⁰⁷⁴ *Programme d'Action National de Lutte Contre la Désertification de Burkina Faso*, 2000, available at: <http://www.unccd.int/ActionProgrammes/botswana-eng2006.pdf>, p. 14.

¹⁰⁷⁵ *Programme d'Action National de Lutte Contre la Désertification de Burkina Faso*, 2000, available at: <http://www.unccd.int/ActionProgrammes/botswana-eng2006.pdf>, p. 3.

¹⁰⁷⁶ *Programme d'Action National de Lutte Contre la Désertification de Burkina Faso*, 2000, available at: <http://www.unccd.int/ActionProgrammes/botswana-eng2006.pdf>, p. 63.

diversified. Moreover, as regards the economic empowerment of disadvantaged groups, Burkina Faso's NAP refers to the vulnerable situation of women and young persons. As for the latter, it is noted that their economic empowerment could be advanced by the experiences they can gain from international labour migration, as long as they are surrounded by favourable conditions thereto¹⁰⁷⁷.

In Cameroon, organised migration is, together with family planning, proposed as a way to cope with demographic challenges in highly populated areas. More in particular, the NAP refers for instance to the North East and North West Benue project, which purpose was to develop the potential of the Benue valley by decreasing population densities in the Mandara Mountains¹⁰⁷⁸. In this area, which was already characterised by relatively fragile ecosystems, a relatively high population growth has increasingly put the pressure on the available natural resources and accelerated the process of desertification¹⁰⁷⁹. In the 1970s, the relocation of a part of the population was organised in order to fight this degradation process. On the other hand, the NAP identifies unorganised migration that took place before 1970 as one of the main sources of the saturation of the land¹⁰⁸⁰. Similarly, the NAPs of other countries have referred to the management of population growth and migration as a strategy to "match people and resources"¹⁰⁸¹. Importantly, the NAP of Ethiopia stresses that this should be done "in a manner which is environmentally sound, economically sustainable, economically and biologically productive as well as socially and culturally acceptable"¹⁰⁸².

¹⁰⁷⁷ Programme d'Action National de Lutte Contre la Désertification de Burkina Faso, 2000, available at: <http://www.unccd.int/ActionProgrammes/botswana-eng2006.pdf>, p. 67.

¹⁰⁷⁸ Plan d'Action National de Lutte Contre la Désertification de Cameroun, 2006, available at: <http://www.unccd.int/ActionProgrammes/cameroon-fre2006.pdf>, p. 12.

¹⁰⁷⁹ Plan d'Action National de Lutte Contre la Désertification de Cameroun, 2006, available at: <http://www.unccd.int/ActionProgrammes/cameroon-fre2006.pdf>, p. 21.

¹⁰⁸⁰ Plan d'Action National de Lutte Contre la Désertification de Cameroun, 2006, available at: <http://www.unccd.int/ActionProgrammes/cameroon-fre2006.pdf>, Annexe 5 : Plans d'Action des Régions Prioritaires, p. 6-7.

¹⁰⁸¹ National Action Programme to Combat Desertification of the Federal Democratic Republic of Ethiopia, Environmental Protection Authority, Addis Ababa, November 1998, available at: <http://www.unccd.int/ActionProgrammes/ethiopia-eng2000.pdf>, p. 57. See also in The National Action Programme To Combat Desertification and Mitigate the Effects of Drought of Islamic Republic of Iran, Forest, Range and Watershed Management Organization, Tehran, 2004, available at: <http://www.unccd.int/ActionProgrammes/iran-eng2004.pdf>, p. 35.

¹⁰⁸² National Action Programme to Combat Desertification of the Federal Democratic Republic of Ethiopia, Environmental Protection Authority, Addis Ababa, November 1998, available at: <http://www.unccd.int/ActionProgrammes/ethiopia-eng2000.pdf>, p. 57.

In countries where the NAP's proposed activities do recommend limiting migration, it mostly concerns measures to limit rural-urban migration, in particular to prevent brain drain in already vulnerable areas¹⁰⁸³. For example the NAP of Egypt contains a recommendation to adopt

“policies for preventing or at least minimizing the migration of local communities (particularly youth that have particular professional skills) from rural areas to urban areas through sustainable land use that encourage planning on scales large enough to maintain the potential of ecosystems and giving titles for land ownership in newly reclaimed land”¹⁰⁸⁴.

In sum, the cause-and-effect relationship between drought, desertification and land degradation on the one hand and migration on the other hand has been recognized in many NAPs, mostly as a problem to be avoided. Similar to the NAPA process under the UNFCCC regime, the NAPs under the UNCCD framework propose measures to halt or at least limit rural-urban migration. However, where migration is presented as a way to diversify livelihoods of drought-affected populations or to relieve pressure on natural resources, it acts as a positive solution to combat desertification or to mitigate the effects of drought, thereby aligning the NAPs to the objectives of the Ten Year-Strategy. In this sense, mainstreaming migration-related policy measures at the local level through the NAP process might contribute to facilitating migration as an adaptive response to environmental changes.

B. Limitations of the UNCCD's NAPs to support adaptive migration

Similar to the evaluation of the NAPAs under the UNFCCC regime above (*see Chapter IV, Section 2.4.1.1.*), some general problems concerning the development of NAPs under the UNCCD regime can be identified. According to the UNCCD Secretariat, affected dryland communities are often “politically marginalized”. Their concerns are not sufficiently taken into account when developing National Action Programmes¹⁰⁸⁵. Thus, in order to address their specific needs, the affected communities should be better represented in the formulation of national strategies and action

¹⁰⁸³ See for example National Action Programme To Combat Desertification (NAP) of The Gambia, November 2000, available at: <http://www.unccd.int/ActionProgrammes/gambia-eng2000.pdf>, p. 63.

¹⁰⁸⁴ Egyptian National Action Program To Combat Desertification, Ministry of Agriculture and Land Reclamation, Desert Research Center (DRC), June 2005, available at : <http://www.unccd.int/ActionProgrammes/egypt-eng2005.pdf>, p. 111.

¹⁰⁸⁵ UNCCD Policy Brief on Migration, ‘Managing environmentally-induced migration in drylands: The Win-Win Strategy’, Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 9.

programmes to combat desertification. In particular for the development of policy measures concerning population movements, local customary patterns, pastoralist arrangements for grazing, as well as the societal impact of mobility measures should be taken into account.

Furthermore, the UNCCD Secretariat has observed a rather limited implementation of the NAPs, due to a lack of appropriate national actions, limited application of technology and local knowledge, and a lack of exchange between scientists and policymakers. Moreover, the NAP process suffers from a lack of financial means to implement the proposed actions to combat desertification and mitigate the effects of drought¹⁰⁸⁶. Obviously, similar to what is concluded above regarding the UNFCCC's NAPAs, adequate funding mechanisms are needed in order to fully implement the UNCCD's goals at the local level through the NAP mechanism.

1.2.4.2. Funding under the UNCCD regime

In order to combat desertification, drought and land degradation and fulfil the UNCCD's goals, sufficient and adequate funding is needed. However, compared to the wide range of funds available under the UNFCCC to mitigate climate change and adapt to its adverse effects, there are much less financial means available to combat environmental degradation under the UNCCD. Unlike both other Rio Conventions, the UNCCD was, at its origin in 1994, not linked to the GEF, nor did it create its own financial instrument to fund the implementing activities of developing countries. Articles 20 and 21 of the Convention set out State Parties' obligation to mobilize the necessary financial resources for affected developing country Parties to combat desertification and mitigate the effects of drought. "In order to increase the effectiveness and efficiency of existing financial mechanisms", the Global Mechanism (GM) was established "to promote actions leading to the mobilization and channelling of substantial financial resources" to affected developing countries¹⁰⁸⁷.

As discussed above (*see Chapter IV, Section 2.4.2.1.*), the Global Environment Facility (GEF) operates as the financial mechanism for some of the key multilateral environmental treaties, such as the UNFCCC and the CBD. As an independently operating financial organisation, the GEF finances

¹⁰⁸⁶ UNCCD Policy Brief on Migration, 'Managing environmentally-induced migration in drylands: The Win-Win Strategy', Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 10.

¹⁰⁸⁷ Article 21(4) UNCCD.

projects regarding climate change, biodiversity, international waters, the ozone layer and persistent organic pollutants in developing countries and countries with economies in transition¹⁰⁸⁸. In 2003, the GEF made land degradation a separate focal area, making it mandatory for the GEF to finance activities to combat desertification. In 2010, the GEF finally amended its charter to become the primary funding mechanism of the UNCCD. As tackling land degradation was high at the GEF's priority list, it increased its allocation to the Land Degradation Focal Area (LDFA) by 30 %, and has up to date funded about 100 projects supporting sustainable land management to combat desertification and deforestation¹⁰⁸⁹.

Now, what can GEF funding under the UNCCD regime, in particular the LDFA, mean for desertification- and drought-induced human mobility? The GEF provides grants to affected developing countries and countries with economies in transition through, *inter alia*, 'GEF financing for enabling activities' and through links to climate change adaptation. As for the latter, countries focusing on activities to combat land degradation may take advantage of the Adaptation Funds managed by the GEF, namely the Special Climate Change Fund (SCCF), the Least Developed Countries Fund (LDCF) and the Adaptation Fund (AF)¹⁰⁹⁰. Their relevance for the issue of environment-induced migration has been discussed above (*see Chapter IV, Section 2.4.2.2.*).

As for the 'GEF financing for enabling activities' under the UNCCD, the intention is to support parties in implementing specific activities which help them to fulfil their obligations under the Convention. One of the priorities is to finance the alignment of NAPs with the UNCCD's Ten Year-Strategy. In this context, the 'GEF financing for enabling activities' might in my opinion be used to finance concrete projects regarding drought-induced migration, in particular in case such projects are guided by the Strategy's first strategic objective, which is "to improve the living conditions of affected populations" in drylands¹⁰⁹¹. However, in practice, this idea is hindered by various problems which have been observed with regard to the allocation of funding to such implementing activities. For instance, a "lack of synergies" between projects and action programmes under the three Rio Conventions has

¹⁰⁸⁸ See <http://www.thegef.org/gef/whatisgef>.

¹⁰⁸⁹ UNCCD Fact Sheet on 'Financing to combat desertification, land degradation and the effects of drought', UNCCD Thematic Fact Sheet Series N° 5, Bonn, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Financing%20Desertification%20fact%20sheet%205%20ENG.pdf>, p. 2.

¹⁰⁹⁰ UNCCD Fact Sheet on 'Financing to combat desertification, land degradation and the effects of drought', UNCCD Thematic Fact Sheet Series N° 5, Bonn, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Financing%20Desertification%20fact%20sheet%205%20ENG.pdf>, p. 2.

¹⁰⁹¹ UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007, p. 9.

influenced the impact of financial resources on the improvement of socio-economic conditions. Furthermore, many national projects do not sufficiently address the need to improve the livelihoods of vulnerable communities living in affected drylands. According to the UNCCD Secretariat, this “can reflect an absence of societal motivation in allocating funds”¹⁰⁹².

1.2.5. The way forward to address migration through the UNCCD regime

In order to address drought-induced migration more efficiently through the UNCCD regime, the UNCCD Secretariat has put forward some policy proposals. Firstly, in addition to mitigating land degradation, the NAPs should more clearly address the first strategic objective of the Ten Year-Strategy, which is to improve the living conditions of affected populations¹⁰⁹³. They can do so, for example, by creating “job alternatives and sustainable livelihoods for pastoralists and farmers in order to alleviate pressure on natural resources”¹⁰⁹⁴. Furthermore, the scientific basis and knowledge on the interaction between drought, land degradation, desertification and migration should be improved, partnerships for research should be built, and awareness among policymakers and the public should be increased. Through the UNCCD’s subsidiary bodies, namely the Committee on Science and Technology (CST) and the Committee for the Review of the Implementation of the Convention (CRIC), the UNCCD framework could, according to its Secretariat, “offer a suitable framework for independent scientific and expert assessment, dialogue and policy coordination” regarding migration¹⁰⁹⁵.

¹⁰⁹² UNCCD Policy Brief on Migration, ‘Managing environmentally-induced migration in drylands: The Win-Win Strategy’, Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 10-11.

¹⁰⁹³ UNCCD, The 10-year strategic plan and framework to enhance the implementation of the Convention (2008–2018), Decision 3/COP.8, Report of the Conference of the Parties on its eighth session, held in Madrid from 3 to 14 September 2007, Addendum, Part two: Action taken by the Conference of the Parties at its eighth session, ICCD/COP(8)/16/Add.1, 23 October 2007, p. 9.

¹⁰⁹⁴ UNCCD Policy Brief on Migration, ‘Managing environmentally-induced migration in drylands: The Win-Win Strategy’, Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 11.

¹⁰⁹⁵ UNCCD Policy Brief on Migration, ‘Managing environmentally-induced migration in drylands: The Win-Win Strategy’, Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 12.

Finally, the Secretariat also proposes to enhance migration among desertification as well as climate change adaptation strategies, and to prioritise the drylands' most vulnerable populations. National adaptation plans should include measures regarding permanent and temporary migration, as well as internal and international migration. According to the Secretariat, "[t]his might include, for example, incentive measures for families that accept to be relocated with a view to restore a given degraded land"¹⁰⁹⁶. Furthermore, regulation facilitating migration and strengthening the benefits of remittances might be incorporated into NAPs and NAPAs.

In sum, the UNCCD framework obviously plays an important role in tackling desertification, land degradation and drought, thereby preventing the need for dryland populations to emigrate out of their region of origin in the first place. However, while it has been shown that the UNCCD represents a useful normative framework for addressing environmental degradation problems, its direct practical relevance for the issue of environment-induced migration is more difficult to establish. Unlike the incorporation of human mobility into the UNFCCC framework, the migration provisions in the UNCCD itself did not have the same political implications for the recognition of the problem of environment-induced migration at the international level. The provisions were more silently adopted in the Convention, in a time when the topic did not (yet) come under the attention of international and national policymakers. However, in the future, the implementation mechanism of the UNCCD regime could provide a useful way to implement certain measures related to adaptive migration at the national level, provided there are sufficient financial means to this end. As there are less financial means available than in the UNFCCC framework, climate change-related funding mechanisms could for example complement the funding available under the UNCCD regime, as mitigating climate change also contributes to the fight against droughts, land degradation and desertification. As for international migration, action programmes should also be developed on a regional basis, thereby creating opportunities to mobilize more financial resources to jointly address drought-induced migration across international borders¹⁰⁹⁷.

The attention devoted to the issue of environment-induced migration by the UNCCD Secretariat is certainly a positive development. In particular the proposals to include measures facilitating adaptive migration in the NAPs are worth further discussion. Furthermore, it is positive that, next to rural-

¹⁰⁹⁶ UNCCD Policy Brief on Migration, 'Managing environmentally-induced migration in drylands: The Win-Win Strategy', Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 13.

¹⁰⁹⁷ UNCCD Policy Brief on Migration, 'Managing environmentally-induced migration in drylands: The Win-Win Strategy', Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p. 10-11.

urban migration, also international migration is mentioned in this context. However, considering the above discussed lack of financial means and the lack of political attention to the UNCCD regime as a legal framework to address environment-induced migration, it is doubtful whether the UNCCD framework can be of any practical relevance in the future to facilitate migration as a strategy to adapt to changing environmental conditions.

2. THE CONVENTION ON BIOLOGICAL DIVERSITY

2.1. Conserving biodiversity and promoting sustainable use of its components

The last of the three “Rio Conventions” that will be discussed in this thesis, is the CBD¹⁰⁹⁸. Together with the UNFCCC, this Convention was opened for signature at the Rio Earth Summit in 1992. The main objectives of the CBD are “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”¹⁰⁹⁹.

The CBD provides a global legal framework concerning biodiversity issues. It contains, among others, measures regarding the conservation of biodiversity, biotechnology, and access to genetic resources. Similar to the UNFCCC and UNCCD regimes discussed above, the Convention established the Conference of the Parties (COP) to review the implementation of the Convention, to adopt programmes of work, to achieve its objectives, and provide policy guidance¹¹⁰⁰. To this end, the COP convenes every two years, or when needed. The Convention also established a Secretariat¹¹⁰¹, and created the Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA), in order to provide recommendations to the COP on the technical aspects of the implementation of the Convention¹¹⁰². At the 10th meeting of the COP in Nagoya in 2010, a new strategic plan was

¹⁰⁹⁸ The Convention on Biological Diversity (CBD), adopted on 5 June 1992 in Rio de Janeiro, entered into force on 29 December 1993, 1760 UNTS 79 (hereafter: Biodiversity Convention).

¹⁰⁹⁹ Article 1 of the Biodiversity Convention.

¹¹⁰⁰ Article 23 of the Biodiversity Convention.

¹¹⁰¹ Article 24 of the Biodiversity Convention.

¹¹⁰² Article 25 of the Biodiversity Convention.

adopted¹¹⁰³. This Strategic Plan for Biodiversity 2011-2020 includes the Aichi Biodiversity Targets, which aim, *inter alia*, at addressing the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society, reducing the direct pressures on biodiversity and promoting sustainable use, improving the status of biodiversity by safeguarding ecosystems, species and genetic diversity, and enhancing the benefits to all from biodiversity and ecosystem services¹¹⁰⁴.

The last decennia have witnessed an important change in conservation science. As the importance of local communities and indigenous groups for biodiversity conservation is now better recognised, the traditional conservation approach, which was often limited to classifying lands as protected areas, has been replaced by a conservation approach with a more human face. For instance, according to Chatty and Colchester, there has been a growing concern about the social impacts of designating protected areas on indigenous groups and other vulnerable communities¹¹⁰⁵. As there are now more references to this human dimension in international biodiversity law, the question rises whether the CBD regime could also adequately address the issue of environment-induced migration.

2.2. Migration and displacement in the Convention on Biological Diversity

2.2.1. Human mobility and the loss of biodiversity

As discussed in Chapter I of this study, the loss of biodiversity has severe effects on people's livelihoods. Communities who strongly rely on ecosystem services for their livelihoods are most vulnerable to this degradation of the environment¹¹⁰⁶. In particular in mountain areas, which often host communities highly dependent on natural resources and agricultural incomes, people are

¹¹⁰³ CBD, Decision X/2 on the 'Strategic Plan for Biodiversity 2011-2020', adopted by the Conference of the Parties on its Tenth Session, held in Nagoya from 18-29 October 2010, UNEP/CBD/COP/DEC/X/2, 29 October 2010.

¹¹⁰⁴ CBD, Decision X/2 on the 'Strategic Plan for Biodiversity 2011-2020', adopted by the Conference of the Parties on its Tenth Session, held in Nagoya from 18-29 October 2010, UNEP/CBD/COP/DEC/X/2, 29 October 2010, p. 8-9.

¹¹⁰⁵ D. Chatty and M. Colchester, 'Introduction. Conservation and Mobile Indigenous Peoples', in D. Chatty and M. Colchester (eds.), *Conservation and Mobile Indigenous Peoples. Displacement, Forced Settlement, and Sustainable Development*, Berghahn Books, Oxford, 2002, p. 1, 8.

¹¹⁰⁶ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009.

severely affected by environmental changes diminishing ecosystem services and fresh water availability¹¹⁰⁷. As a result of biodiversity losses, migration then becomes a common response for those communities. Similarly, in small island nations, where the population is highly reliant on fishing, tourism or other biodiversity-based sectors, the loss of biodiversity takes important sources of livelihood provision away, resulting in migration and displacement of the island community¹¹⁰⁸.

Aside from human mobility caused by biodiversity losses, the conservation measures to preserve biodiversity themselves might become a cause of population movements. When a certain land is designated as a protected area, the inhabitants often have no other choice than to leave the area. They can become displaced persons, or become subject to forced resettlement. In particular for indigenous peoples, the imposition of protected areas has in the past caused serious damage to their lives and livelihoods¹¹⁰⁹. In Nepal for example, the Tharu people were forcibly removed from the Royal Chitwan National Park. Between 1994 and 1999, about 2000 people were forced to move out of an enclave in the park, and were resettled on poor soils, with little access to water and forest resources¹¹¹⁰. Other examples of conservation-related displacement are found in Tanzania, where the establishment of the Tarangire and Manyara National Parks have evicted many local pastoralists, or in India, where 4 million people were faced with forced resettlement as a result of the strengthening of conservation legislation¹¹¹¹. Often, the socio-economic characteristics and cultural identity of the population were disregarded in the organisation of planned relocation for large-scale conservation projects¹¹¹². Fortunately, in recent years, such involuntary resettlements become increasingly questioned. And where certain communities still need to make place for protected areas, the planned relocation needs to be well organised, and with respect for the affected persons' human rights.

¹¹⁰⁷ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 93.

¹¹⁰⁸ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 117.

¹¹⁰⁹ D. Chatty and M. Colchester, 'Introduction. Conservation and Mobile Indigenous Peoples', in D. Chatty and M. Colchester (eds.), *Conservation and Mobile Indigenous Peoples. Displacement, Forced Settlement, and Sustainable Development*, Berghahn Books, Oxford, 2002, p. 2-3.

¹¹¹⁰ J. McLean and S. Straede, 'Conservation, relocation and the paradigms of park and people management – a case study of Padampur villages and the Royal Chitwan National Park, Nepal', 16 *Society and Natural Resources* 6, 2003, p. 509-526.

¹¹¹¹ D. Brockington and J. Igoe, 'Eviction for Conservation: A Global Overview', 4 *Conservation and Society* 3, 2006, p. 443-444.

¹¹¹² See for a global overview of the issue of so-called "conservation refugees": D. Brockington and J. Igoe, 'Eviction for Conservation: A Global Overview', 4 *Conservation and Society* 3, 2006, p. 424-470; A. Agrawal and K. Redford, 'Conservation and Displacement: An Overview', 7 *Conservation and Society* 1, 2009, p. 1-10; Michael M. Cernea and Kai Schmidt-Soltau, 'Poverty Risks and National Parks: Policy Issues in Conservation and Resettlement', 34 *World Development* 10, 2006, p. 1808-1830.

Thus, where human mobility is considered in the context of biodiversity losses, the same classification of types of mobility can be made as the one above, namely including migration, displacement, as well as planned relocation. Furthermore, migration should not only be considered as a problem resulting from biodiversity losses. Migration and planned relocation can, if managed well and with respect for migrants' fundamental rights, also serve as a conservation strategy.

2.2.2. Addressing migration and displacement in the framework of the Convention on Biological Diversity

Unlike the UNCCD, the CBD does not contain any references to migration or displacement. Similarly, the Conference of the Parties has up to date not extensively addressed the issue in its two-yearly meetings. Where COP decisions do refer to "relocation and assisted migration", it concerns migration of endangered or protected species¹¹¹³. The few references to human mobility in COP decisions concern the resettlement of indigenous peoples out of protected areas¹¹¹⁴, or the displacement of local communities due to the degradation of coastal resources having an impact on tourism¹¹¹⁵. However, those provisions do not contain any clear obligations on the part of the state. Human mobility is thus not considered in a substantial way by the COP to the CBD, and neither is it in decisions of the Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA). Similarly, the Strategic Plan for Biodiversity 2011-2020, including the Aichi Biodiversity Targets, does not include any references to the issue¹¹¹⁶.

¹¹¹³ See for example CBD, Decision X/33 on 'Biodiversity and climate change', adopted by the Conference of the Parties on its Tenth Session, held in Nagoya from 18-29 October 2010, UNEP/CBD/COP/DEC/X/33, 29 October 2010, p. 2; CBD, Decision VIII/30 on 'Biodiversity and climate change: guidance to promote synergy among activities for biodiversity conservation, mitigating or adapting to climate change and combating land degradation', adopted by the Conference of the Parties on its Eight Session, held in Curitiba, Brazil from 20-31 March 2006, UNEP/CBD/COP/DEC/VIII/30, 15 June 2006, § 4.

¹¹¹⁴ CBD, Decision VII/16 on 'Article 8(j) and related provisions', adopted by the Conference of the Parties on its Seventh Session, held in Kuala Lumpur from 9-20 and 27 February 2004, UNEP/CBD/COP/DEC/VII/16, 13 April 2004, p. 23; CBD, Decision VII/28 on 'Protected areas (Articles 8 (a) to (e))', adopted by the Conference of the Parties on its Seventh Session, held in Kuala Lumpur from 9-20 and 27 February 2004, UNEP/CBD/COP/DEC/VII/28, 13 April 2004, p. 14.

¹¹¹⁵ CBD, Decision V/25 on 'Biological Diversity and Tourism', adopted by the Conference of the Parties on its Fifth Session, held in Nairobi from 15 - 26 May 2000, UNEP/CBD/COP/5/23, p. 193.

¹¹¹⁶ CBD, Decision X/2 on the 'Strategic Plan for Biodiversity 2011-2020', adopted by the Conference of the Parties on its Tenth Session, held in Nagoya from 18-29 October 2010, UNEP/CBD/COP/DEC/X/2, 29 October 2010.

However, the plight of indigenous peoples and local communities has gone through an intensive advocacy process in the framework of the CBD¹¹¹⁷, and their rights are now explicitly recognised in COP decisions¹¹¹⁸. States are for example committed to involve indigenous peoples and local communities in establishing and managing protected areas and let them participate in decision-making on a fair and equitable basis, and in full respect of their human and social rights¹¹¹⁹. So while environment-induced human mobility is not explicitly addressed as a core concern in the CBD regime, the attention for the rights of indigenous people and local communities provides another pathway to take the needs of environment-induced migrants and displaced persons into account.

2.2.3. Implementation mechanisms

Even though there are no explicit provisions regarding environment-induced mobility in the framework of the CBD, it is nonetheless interesting to examine what a migration provision, comparable to paragraph 14(f) of the Cancun Agreements in the UNFCCC framework, could mean in practice if it were to be adopted in the framework of the CBD. Parallel to the discussions above on the treatment of human mobility in the UNFCCC and UNCCD regimes, a number of implementation and funding mechanisms could be studied.

As the for the implementation mechanisms of the CBD regime, the National Biodiversity Strategies and Action Plans (NBSAPs) deserve some attention. Article 6 CBD on General Measures for Conservation and Sustainable Use requires State Parties to “[d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity”¹¹²⁰. Up to date, 178

¹¹¹⁷ M. Colchester et al., ‘Conservation and Indigenous Peoples : Assessing the Progress since Durban’, Contribution to the World Conservation Congress, Forest Peoples Programme (FPP), FPP series on Forest Peoples and Protected Areas, October 2008, available at: <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/wccconservationandipsinterimrepsept08eng.pdf>.

¹¹¹⁸ See for example CBD, Decision VII/16 on ‘Article 8(j) and related provisions’, adopted by the Conference of the Parties on its Seventh Session, held in Kuala Lumpur from 9-20 and 27 February 2004, UNEP/CBD/COP/DEC/VII/16, 13 April 2004; CBD, Decision VII/28 on ‘Protected areas (Articles 8 (a) to (e))’, adopted by the Conference of the Parties on its Seventh Session, held in Kuala Lumpur from 9-20 and 27 February 2004, UNEP/CBD/COP/DEC/VII/28, 13 April 2004; CBD, Decision X/1 on ‘Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization’, UNEP/CBD/COP/DEC/X/1, 29 October 2010.

¹¹¹⁹ CBD, Decision VII/28 on ‘Protected areas (Articles 8 (a) to (e))’, adopted by the Conference of the Parties on its Seventh Session, held in Kuala Lumpur from 9-20 and 27 February 2004, UNEP/CBD/COP/DEC/VII/28, 13 April 2004, § 22.

¹¹²⁰ Article 6 CBD.

State Parties have developed NBSAPs in line with this provision¹¹²¹. Despite the lack of explicit references to environment-induced migration in the Convention, some countries do consider the issue in their NBSAPs. The NBSAP of Tanzania for example mentions migration as a factor affecting the country's natural resource base¹¹²². Importantly, in order to promote agro-biodiversity resources at national and international markets, the action plan also refers to the introduction and promotion of livestock and human migration guidelines as one of the strategic choices to be made. This way, awareness should be raised on the loss of agro-biodiversity due to human migration, and guidelines should be established to safeguard those biodiversity losses¹¹²³.

Other NBSAPs refer to measures for the resettlement of certain affected populations. For instance the programme of Sierra Leone proposes to "promote support and enhance the ongoing rehabilitation and resettlement programmes for displaced populations", as a measure to prevent deforestation and promote better management of inland water ecosystems¹¹²⁴. It is clear that, despite the lack of important references to human mobility in the CBD itself or in its COP's decisions, it does not prevent countries from treating the issue in their national implementation mechanisms. However, the issue is much less present than in the implementation mechanisms within the UNCCD framework (where the Convention itself refers to human mobility) and the UNFCCC framework (where the issue is incorporated into the Adaptation Framework). Despite the change in conservation science to a more human approach, respecting the rights of indigenous groups and local communities, it thus seems that the CBD framework has currently little practical neither financial relevance for the issue of environment-induced migration. That being said, the importance of biodiversity law for the prevention of environment-induced population movements cannot be ignored. As discussed above, nature conservation measures do play a crucial role, not only in the prevention of migration from happening in the first place, but also in the recovery of affected areas, making it possible for affected populations to return to their region of origin.

¹¹²¹ See <http://www.cbd.int/nbsap/default.shtml>.

¹¹²² National Biodiversity Strategy and Action Plan of Tanzania, Vice President's Office of the United Republic of Tanzania, August 2001, available at: <http://www.cbd.int/doc/world/tz/tz-nbsap-01-en.pdf>, p. 18.

¹¹²³ National Biodiversity Strategy and Action Plan of Tanzania, Vice President's Office of the United Republic of Tanzania, August 2001, available at: <http://www.cbd.int/doc/world/tz/tz-nbsap-01-en.pdf>, p. 52, 76.

¹¹²⁴ Biodiversity: Strategic Action Plan of Sierra Leone, 2006, available at: <http://www.cbd.int/doc/world/sl/sl-nbsap-01-en.pdf>, p. 47.

Interim conclusion on migration in international environmental law

Chapter IV of this study has attempted to discuss the role which the international climate regime can play for people migrating due to the adverse effects of climate change. It has given an overview of the emergence of human mobility into the international climate change regime, and has discussed how migration, displacement and planned relocation are framed within the Cancun Adaptation Framework. Furthermore, the goal was to provide deeper insight into the implications of addressing migration in the UNFCCC regime, and the possible implementation of such a migration provision through various instruments of the climate change architecture. Finally, some opportunities for the way forward were briefly addressed.

It is clear that paragraph 14(f) of the Cancun Adaptation Framework has provided a crucial momentum for the issue of climate-induced human mobility, as it will go down in history as the first ever mentioning of climate migration in an official COP decision within the international climate change framework. By describing the emergence of human mobility into the UNFCCC regime, Chapter IV has provided an analysis of the extent to which international environmental law is equipped to deal with one of the big challenges our warming world is facing.

Reframing the question of the legal value of the Cancun Agreements, I have found that the Cancun Adaptation Framework does not contain binding state obligations regarding adaptation to the adverse effects of climate change. However, paragraph 14(f), although not legally binding, has a strong symbolic and political value, as it is situated in an important part of the Adaptation Framework. With this provision, the international community recognises the influence of our changing climate on human mobility, and paves the way for migration-related adaptation actions on the ground. Migration now features in a list of activities that can be considered 'adaptive', and might qualify for adaptation funding. Aside from improved funding opportunities, addressing migration in the international climate change framework also has the advantage of providing "a voice to all nations of the world", including the most vulnerable countries, in one of the highest profile international fora¹¹²⁵. These developments within the Cancun Adaptation Framework could even

¹¹²⁵ K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations', Paper prepared for the UNHCR's Expert Roundtable on Climate Change and Displacement, convened from 22 to 25 February 2011 in Bellagio, Italy, Legal and Protection Policy Research Series, UNHCR,

encourage other environmental policy fora to address the issue of environment-induced migration more accurately. After all, as the UNFCCC regime can only address climate-induced migration, it does not take account of environmental push factors other than climate change impacts. Moreover, paragraph 14(f) could work as a catalyst for national action on climate-related human mobility. Finally, the inclusion of migration into the Cancun Adaptation Framework could even have legal repercussions, if it would be incorporated into a future UNFCCC protocol, legal instrument or agreed outcome with legal force.

However, it is important to keep the limits of what can be achieved within the international climate regime in mind. Firstly, COP decisions can only elaborate existing treaty obligations. They cannot create substantive new and legally-binding obligations, and can therefore not lead to concrete state obligations regarding climate-induced migration, displacement and planned relocation. Furthermore, the text placement and wording of paragraph 14(f) suggests the non-controversial nature of the topic, in particular in terms of what was being asked of national governments, that is: only voluntary measures to enhance understanding, coordination and cooperation on the topic¹¹²⁶. Therefore it must be concluded that paragraph 14(f), as it is currently phrased, could not lead to state obligations regarding climate-induced migration, displacement and planned relocation, in case it would be copied into a future legally-binding instrument. In fact, as a treaty regime within international environmental law, the UNFCCC framework is primarily concerned with interstate relations, and is not tailored to grant specific rights to individuals, such as human rights protection or a right to asylum for climate-induced displaced persons¹¹²⁷. Instead, it is a legal framework which imposes interstate duties, with the aim “to prevent dangerous human interference with the climate system”¹¹²⁸.

Nonetheless, ever since the inclusion of migration in the Cancun Adaptation Framework, several countries have already hosted international conferences on the topic, and funded research projects. So if anything, the incorporation of climate-induced migration in the UNFCCC regime has given the

Division of International Protection, May 2011, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e09a3d32>, p. 13.

¹¹²⁶ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 11.

¹¹²⁷ B. Docherty and T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’, 33 *Harvard Environmental Law Review* 2, 2009, p. 358, 395-396; E.T. Litwin, ‘The Climate Diaspora: Indo-Pacific Emigration from Small Island Developing States’, Thesis submitted to the McCormack Graduate School of Policy and Global Studies, International Relations Masters Program, University of Massachusetts, May 2011, p. 46.

¹¹²⁸ Article 2 of the UNFCCC.

topic more legitimacy, and has raised the interest in the issue among governments and international organisations¹¹²⁹. It can even be argued that it has opened the way for longer-term thinking about topics like population shifts, adaptation planning and governance of borders and human mobility at different policy levels in a world which might face global warming far beyond 2°C¹¹³⁰. As for implementation, paragraph 14(f) could lead to the inclusion of migration-related measures into national adaptation planning and mechanisms such as the Warsaw Loss and Damage Mechanism, but also, more broadly, into development cooperation and disaster risk reduction strategies. Indeed, climate change-related migration was considered not only as part of adaptation action, but also as part of the new UNFCCC loss and damage mechanism. Linking the adaptation framework with the loss and damage programme could now help to advance the topic of climate-induced human mobility in the international climate change framework into more practical solutions.

Of course, quite a lot of the suggestions discussed in this Chapter could also be realised through a separate international convention on environment-induced migration, outside of the UNFCCC regime. Likewise, the political arguments against such a new *sui generis* convention, such as the lack of political appetite for such an instrument, can also be held against the adoption of more concrete provisions in a legally-binding instrument within the international climate regime, or against a new UNFCCC protocol on the topic. However, as Gogarty states, the UNFCCC regime has the advantage of being “a well established system that possesses more than two decades of institutional knowledge, scientific and technical resources and the commitment of almost every state in the world to combating climate change”¹¹³¹. Concrete legally-binding provisions in a new legal instrument, or an additional protocol on climate-induced human mobility would thus allow states to show their commitment towards addressing the adverse effects of climate change within the international climate change regime.

After assessing the added value of the UNFCCC regime for environment-induced migration and displacement, Chapter V briefly touched upon the other main multilateral environmental

¹¹²⁹ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 25.

¹¹³⁰ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 16, 28-29.

¹¹³¹ B. Gogarty, ‘Climate-Change Displacement: Current Legal Solutions to Future Global Problems’, 21 *Journal of Law, Information and Science* 1, 2011, p. 22.

agreements, namely the UNCCD and the CBD. It has been shown that, while the UNCCD does mention the issue in the text of the Convention itself, the CBD does not include any references to environment-induced mobility. However, this disparity does not make a huge difference in practice. Similar to the NAPAs in the UNFCCC framework, the national implementation mechanisms of both other Rio frameworks could, to a limited extent, include measures regarding migration, displacement or planned relocation. However, these frameworks have much less practical relevance than the UNFCCC regime, as they are institutionally weaker, and, more importantly, have less financial means available than the international climate change regime. Moreover, it is mostly the political discussion foregoing the inclusion of migration in the Cancun Adaptation Framework that has an important symbolic value for the recognition of the issue in international policymaking. Such discussion did not take place within the framework of the other Rio Conventions.

Nonetheless, as the dynamics of climate change, desertification and land degradation, and biodiversity loss are intimately connected, the three Rio Conventions should and could collaborate more closely, including for the treatment of environment-induced human mobility. Perhaps the issue of environment-induced migration could offer an opportunity for more coordination and cooperation, in particular among the implementation mechanisms of the three frameworks. The promotion of complementarities among the NAPAs of the UNFCCC, the NAPs of the UNCCD and the NBSAPs of the CBD could further enhance the impact of national strategies and action plans in the context of environment-induced migration, displacement and planned relocation¹¹³².

While the topic of climate-induced human mobility was not addressed at the Rio Earth Summit in 1992, more than 20 years later, more attention should be devoted to the topic in international environmental fora, using the UNFCCC process as a precedent for addressing migration in international environmental law. However, although international environmental law is of obvious relevance for the prevention of environment-induced mobility, for the implementation of concrete migration-related policy measures, it does not provide the sole answer. As discussed above, the Cancun Adaptation Framework does not 'invite' states to grant residence rights to climate-induced displaced persons, or to facilitate international migration as an adaptation strategy for the most affected and vulnerable populations, let alone that it would 'oblige' them to do so. In particular international migration touches upon the important national prerogative of defining who can enter a country's territory. Whether or not states decide to facilitate international adaptive migration

¹¹³² UNCCD Policy Brief on Migration, 'Managing environmentally-induced migration in drylands: The Win-Win Strategy', Discussion paper prepared by the UNCCD secretariat, August 2009, available at: <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Migration%20policy%20brief%20Final%20draft.pdf>, p.12.

therefore remains a matter of state sovereignty, and must be addressed in national or regional migration law and policy, instead of international environmental law. While it is crucial to integrate migration into disaster risk reduction and adaptation frameworks, it is therefore equally important to integrate disaster risk reduction and climate change adaptation into migration law and policy. Migration law and environmental law are thus complementary legal frameworks to address the issue of environment-induced human mobility, ranging from migration to displacement to planned relocation.

PART III

Adaptive migration and the EU: developing a set of policy options at the regional level

Chapter VI. Environment-induced migration and the European Union

PART II of this thesis has concluded that, although international environmental law has some relevance in the context of migration and environmental change, it needs to be complemented with measures in the field of migration law in order to facilitate international adaptive migration. Before Chapter VII will provide some recommendations on how exactly to integrate this adaptation perspective into EU migration legislation and policy, this Chapter will first outline how environment-induced migration has up till now been addressed at the EU policy level.

The European focus of this PART is justified for a number of reasons. Firstly, while it has been recognised that environment-induced migration mostly occurs within countries or regions, longer-distance migration is not excluded. In particular in a later mobility phase, migrants sometimes move further away after having ended up in regions which face the same environmental, political or social problems as their home regions. Furthermore, environment-induced population movements do not only occur in Africa or Asia, but in the European neighbourhood as well¹¹³³. As part of the solution for the facilitation of international adaptive migration lies in the innovation of immigration law and policy, this Part necessarily has a national or - in case of the EU - regional focus. Finally, EU Member States as well as the Union as a whole can act as an example for solving the issue at the international level, by starting to comprehensively address the issue of environment-induced human mobility in their own migration, environmental and development policies.

¹¹³³ See for example A. Vag, 'Environmental Migration Scenarios: The Balkans', Case Study Report for the Environmental Change and Forced Migration Scenarios (EACH-FOR) project, 2009, available at: http://www.each-for.eu/documents/CSR_Balkans_090501.pdf; S. Burke, M. Mulligan, K. Parks And A. van Soesbergen, 'DR8a: Quantifying change in ecosystem services and exposure to hazards in the Mediterranean basin over the next 50 years that might be relevant to migration', Review commissioned as part of the UK Government's Foresight Project 'Migration and Global Environmental Change', October 2011, available at: <http://www.bis.gov.uk/assets/foresight/docs/migration/drivers/11-1177-dr8a-ecosystem-services-and-hazards-in-mediterranean-basin.pdf>; A. Fermin, 'Migration, Environment and Development in Southeastern Spain', Case Study Report for the Environmental Change and Forced Migration Scenarios (EACH-FOR) project, 2008, available at: http://www.each-for.eu/documents/CSR_Spain_090328.pdf; A. Bilgic, 'CS8: Is the EU offloading future migration issues to the 'southern neighbourhood'?': Thinking environmental migration in relation to externalisation', review commissioned as part of the UK Government's Foresight Project, Migration and Global Environmental Change, October 2011, available at: <http://www.bis.gov.uk/assets/foresight/docs/migration/case-studies/11-1160-cs8-eu-offloading-future-migration-issues.pdf>, p. 6-7.

1. EUROPEAN COMPETENCE AND POLICY REGARDING THE IMMIGRATION OF THIRD COUNTRY NATIONALS

Before the emergence of the issue of environment-induced migration at the EU policy level can be discussed, this Section will briefly outline the EU's competence and recent policy developments regarding the immigration of third country nationals. This political frame will then facilitate further discussions on the topic in Chapter VII.

1.1. From intergovernmental cooperation towards a common European immigration policy

While the free movement of European citizens was key to the European integration process, the immigration of third country nationals remained for a long time an area of national competence¹¹³⁴. As Europe changed from a continent of emigration into a continent of immigration, the EU Member States gradually turned their eyes towards the Community, and later the Union, to address the entry and residence of third country nationals. Immigration developed from an area of intergovernmental cooperation to a matter of common interest. Slowly, a European immigration law and policy came into being, albeit with clear restrictions on the Union's competence.

1.1.1. Intergovernmental cooperation

At the time when European governments were confronted with growing numbers of third country immigrants - both legally (mainly through family reunification) and illegally - the Single European Act of February 1986 was signed in order to complete the European integration process and finalise the

¹¹³⁴ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis lli, Intersentia, Antwerp, 2009, p. 11.

internal market before 31 December 1992¹¹³⁵. The abolishment of internal border controls raised awareness among Member States that they would need to cooperate and coordinate their actions in order to improve the efficiency of immigration control¹¹³⁶. However, since the Member States still proved to be reluctant to hand over their national sovereignty on immigration issues to the European Community, they decided to cooperate on an intergovernmental level¹¹³⁷.

Within this period of intergovernmental cooperation on immigration, two important movements can be distinguished, namely the 'Schengen cooperation' and the 'Dublin cooperation'. While the former led to the introduction of a common Schengen visa for short term residence¹¹³⁸, the latter introduced a system of inter-state attribution of responsibility to assess asylum applications, meant to prevent asylum seekers from 'asylum shopping' in the EU¹¹³⁹.

When in 1992, the EU was created by the Maastricht Treaty, or the Treaty on the European Union (TEU)¹¹⁴⁰, the European integration was extended to new areas, opening the way to political integration. The Maastricht Treaty recognised immigration and asylum as matters of common interest to the Member States, by incorporating this area into Title VI of the TEU on Justice and Home Affairs¹¹⁴¹. As the Member States were aware of the new challenges the Union would face in the future, such as the enlargement of the Union, they inserted a revision clause in the TEU¹¹⁴², providing for an intergovernmental conference in 1996, which eventually led to the conclusion of the Treaty of Amsterdam in 1997¹¹⁴³.

¹¹³⁵ Article 13, Single European Act, adopted on 28 February 1986, entered into force on 1 July 1987, *Official Journal* L 169 of 29 June 1987.

¹¹³⁶ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis Iii, Intersentia, Antwerp, 2009, p. 41.

¹¹³⁷ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis Iii, Intersentia, Antwerp, 2009, p. 42.

¹¹³⁸ Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, *Official Journal* L 239 of 22 September 2000, p. 19-62.

¹¹³⁹ Convention of 15 June 1990 determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, *Official Journal* C 254 of 19 August 1997, p. 1-12.

¹¹⁴⁰ Treaty on the European Union (TEU), signed in Maastricht on 7 February 1992, entered into force on 1 November 1993, *Official Journal* C 191 of 29 July 1992.

¹¹⁴¹ Article K.1, Treaty on the European Union (TEU), signed in Maastricht on 7 February 1992, entered into force on 1 November 1993, *Official Journal* C 191 of 29 July 1992.

¹¹⁴² Article N, Treaty on the European Union (TEU), signed in Maastricht on 7 February 1992, entered into force on 1 November 1993, *Official Journal* C 191 of 29 July 1992.

¹¹⁴³ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997, entered into force on 1 May 1999, *Official Journal* C 340/1 of 10 November 1997.

1.1.2. Communitarisation and the Treaty of Lisbon

While the 1992 Maastricht Treaty had only designated immigration and asylum as matters of common interest, the Treaty of Amsterdam transferred this area from the third (EU) pillar to the first (EC) pillar. The Treaty inserted a new Title IV in the Treaty on the European Community (EC Treaty), on ‘Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons’¹¹⁴⁴.

Since the adoption of the Amsterdam Treaty, a range of specific directives and regulations on asylum and migration have been adopted, such as the 2001 Temporary Protection Directive¹¹⁴⁵ and the 2004 Qualification Directive¹¹⁴⁶. In 2009, the Treaty of Lisbon¹¹⁴⁷ finally entered into force, bringing the ‘area of freedom, security and justice’, introduced by the Treaty of Amsterdam, within one single frame, namely Title V of the Treaty on the Functioning of the European Union (TFEU)¹¹⁴⁸. This change of structure brought about a change of competence, decision-making procedures, and jurisdiction of the Court of Justice regarding immigration and asylum matters¹¹⁴⁹. The Union shall now “ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals”¹¹⁵⁰.

¹¹⁴⁴ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997, entered into force on 1 May 1999, *Official Journal* C 340/1 of 10 November 1997; P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis Iii, Intersentia, Antwerp, 2009, p. 11.

¹¹⁴⁵ European Council, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *Official Journal* L 212 of 7 August 2001, p. 12–23.

¹¹⁴⁶ European Council, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal* L 304 of 30 September 2004, p. 12–23.

¹¹⁴⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, entered into force on 1 December 2009, *Official Journal* C 306 of 17 December 2007.

¹¹⁴⁸ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), *Official Journal* C 83/47 of 30 March 2010.

¹¹⁴⁹ S. Peers, Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon’, 10 *European Journal of Migration and Law*, 2008, p. 219.

¹¹⁵⁰ Article 67(2) TFEU.

1.2. The EU's competence in the area of border controls, asylum and migration

As before, the EU and its Member States have shared competences on justice and home affairs matters¹¹⁵¹. This entails that Member States can exercise competence to the extent that the Union has not done so, or has ceased to do so¹¹⁵². Chapter 2 of Title V, on 'Policies on border checks, asylum and immigration' addresses the EU's competences regarding

- 1) border controls and visas (Article 77 TFEU),
- 2) asylum and complementary forms of protection (Article 78 TFEU),
- 3) immigration (Article 79 TFEU), and
- 4) solidarity and fair sharing of responsibility between Member States (Article 80 TFEU).

As regards asylum issues, Article 78 TFEU does no longer refer to the narrow formulation of 'minimum standards' of the former EC Treaty. Instead, it has introduced the goal of a "common policy on asylum, subsidiary protection and temporary protection", with the aim to offer an appropriate status to any third-country national requiring international protection and to ensure compliance with the principle of *non-refoulement*¹¹⁵³. In order to achieve these ambitious goals, the European Parliament and the Council "shall adopt measures for a common European asylum system"¹¹⁵⁴.

Similarly, as regards the immigration of third country nationals, the TFEU provides that the Union shall develop

"a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat illegal immigration and trafficking in human beings"¹¹⁵⁵.

¹¹⁵¹ Art. 4(2)(j) TFEU.

¹¹⁵² Art. 2(2) TFEU; S. Peers, Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', 10 *European Journal of Migration and Law*, 2008, p. 221.

¹¹⁵³ Article 78(1) TFEU.

¹¹⁵⁴ Article 78(2) TFEU.

¹¹⁵⁵ Article 79(1) TFEU.

The EU's competence regarding immigration is set out in Article 79(2)(a) and (b) and (4) TFEU, with an important limitation on competence in Article 79(5) TFEU. A common immigration policy includes for instance measures concerning "the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits"¹¹⁵⁶. As will be discussed further below in Chapter VII, this provision allows the EU to take up the issue of environment-induced migration, and effectively incorporate an environmental perspective into its immigration law and policy.

1.3. European policy framework

1.3.1. From guest worker programmes to a labour migration stop

Due to the economic boom of the 1960s, there was a huge shortage of labour forces in Europe. In particular West European countries therefore installed recruitment systems for foreign workers, who initially came from Spain, Portugal, Italy and Greece, later followed by migrants from the Maghreb countries and Turkey. A substantial part of those guest workers not only migrated for labour reasons, but often fled dictatorial regimes, such as in Spain or Greece, or situations of humanitarian distress. European labour migration regimes offered them an escape route, without having to apply for asylum¹¹⁵⁷.

As a result of the economic recession following the 1973 oil crisis, these guest worker programmes officially came to an end. Many European States decided to close their doors for general labour migrants in the 1970s. Since then, states employ stricter requirements for the issuance of residence and work permits for third country labour migrants, almost exclusively focusing on high-skilled workers. Today, family reunification has become the main source of immigration into European countries. And while migration is increasingly used as a means to escape poverty, conflicts and humanitarian distress, these decreased possibilities for labour migration now force more migrants to try to enter Europe by irregular means or to apply for asylum¹¹⁵⁸.

¹¹⁵⁶ Article 79(2)(a) TFEU.

¹¹⁵⁷ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis Iii, Intersentia, Antwerp, 2009, p. 8.

¹¹⁵⁸ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis Iii, Intersentia, Antwerp, 2009, p. 9.

1.3.2. *The Global Approach to Migration and Mobility: the external dimension of the EU's migration policy*

With the Amsterdam Treaty and the creation of the area of freedom, security and justice, the first steps towards a common comprehensive migration policy were taken. While the first years were characterised by a security-oriented approach, focusing on the fight against irregular migration, the positive migration-development nexus increasingly gained attention among European policymakers¹¹⁵⁹. This trend, which slowly broadened the EU's thematic priorities to legal migration as well, was already reflected in the Hague Programme of 2004, which set out the EU's priorities with a view to strengthening the area of freedom, security and justice in the next five years¹¹⁶⁰. The Commission was for example invited to "present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005"¹¹⁶¹.

In the Commission's Communication on Migration and Development of 2005, the possible benefits of migration for development were acknowledged, and further steps for improving this development impact were proposed¹¹⁶². In its Policy Plan on Legal Migration, the Commission proposed to adopt four new directives, including entry conditions for highly qualified workers, seasonal workers, intra-corporate transferees and remunerated trainees¹¹⁶³. As Member States did not favour a "horizontal approach" to all migrant categories, the opportunities for labour migration were still limited to those categories in the interest of the Member States as receiving countries, and did not address the need of developing countries for lower or unskilled emigration opportunities¹¹⁶⁴. Measures proposed to

¹¹⁵⁹ P. Devisscher, 'Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues', 13 *European Journal of Migration and Law* 1, 2011, p. 57-58.

¹¹⁶⁰ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, *Official Journal* C 53/1 of 3 March 2005.

¹¹⁶¹ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, *Official Journal* C 53/1 of 3 March 2005, p. 4.

¹¹⁶² European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on 'Migration and Development: Some concrete orientations', COM(2005) 390 final, Brussels, 1 September 2005, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0390:FIN:EN:PDF>; P. Devisscher, 'Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues', 13 *European Journal of Migration and Law* 1, 2011, p. 58.

¹¹⁶³ European Commission, Communication from the Commission on a 'Policy Plan on Legal Migration', COM(2005) 669 final, Brussels, 21 December 2005, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0669:FIN:EN:PDF>.

¹¹⁶⁴ P. Devisscher, 'Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues', 13 *European Journal of Migration and Law* 1, 2011, p. 58.

unite the interests of receiving and sending countries, such as through temporary, circular and return migration, as well as measures to mitigate brain drain, were still in their infancy.

Since 2005, the positive migration-development nexus, and the call for more coherence, became thematic priorities of the EU's migration policy. Similarly, the idea that temporary and circular migration could facilitate legal migration while at the same time alleviating the brain drain problem, increasingly gained ground. The policy change from a security-oriented approach towards a more comprehensive migration policy was finally confirmed in the Global Approach to Migration, which since 2005 represents the EU's framework for dialogue and cooperation with non-EU countries of origin, transit and destination, with a view to enabling migration and asylum issues to be addressed in a comprehensive way. Its main goals are the improvement of the organisation of legal migration and facilitated mobility, the prevention and reduction of irregular migration in an efficient yet humane way, and the strengthening of synergies between migration and development¹¹⁶⁵.

In order to make this external dimension of the EU's migration policy work, the EU has developed a number of specific tools under the framework of the Global Approach, such as migration missions and mobility partnerships with third countries (*see further below under Chapter VII*). However, the options for legal migration still remained limited, and were dominated by the interests of European countries¹¹⁶⁶. The intention of promoting migration for development and addressing brain drain remained "overshadowed by the desire to attract the brightest and best to Europe"¹¹⁶⁷. The idea of circular migration was for example more motivated by the guarantee of the return of the migrants, than by the possible benefits which the circular migrant could bring to his or her region of origin¹¹⁶⁸.

As the idea of a coherent, coordinated and comprehensive European migration policy stayed an important aspiration, the Stockholm Programme was adopted by the European Council in December 2009 as the new five year programme in the area of justice, freedom and security¹¹⁶⁹. This Programme went further in implementing the ideas of the Global Approach to Migration. It emphasised for example the need for an external dimension of Europe's migration policy, by

¹¹⁶⁵ P. Devisscher, 'Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues', 13 *European Journal of Migration and Law* 1, 2011, p. 59-62.

¹¹⁶⁶ P. Devisscher, 'Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues', 13 *European Journal of Migration and Law* 1, 2011, p. 59-60.

¹¹⁶⁷ E. Collett, 'The 'Global Approach to Migration': rhetoric or reality?', European Policy Centre, Policy Brief of November 2007, available at: <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=45563>.

¹¹⁶⁸ P. Devisscher, 'Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues', 13 *European Journal of Migration and Law* 1, 2011, p. 60-61.

¹¹⁶⁹ European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens', Brussels, 16 October 2009, *Official Journal* C 115/1-38 of 4 May 2010.

extending the dialogue and cooperation to other areas, such as the Caribbean. The Programme and its Action Plan also incorporated the new provisions of the Lisbon Treaty, while the mobility partnerships and circular migration are, together with other initiatives, still considered as important tools to include other legal migration options¹¹⁷⁰.

In order to further stress the benefits of well-managed migration and respond to changing migration trends, the Global Approach to Migration was renewed in 2011, and became the Global Approach to Migration and Mobility. Among the objectives were a stronger policy coherence with other policy areas, and more in particular between the external and internal dimensions of those policies, as well as a better thematic and geographical balance¹¹⁷¹. One of the priorities of the renewed Global Approach is to define the framework “in the widest possible context as the overarching framework of EU external migration policy, complementary to other, broader, objectives that are served by EU foreign policy and development cooperation”¹¹⁷². To this end, both the Union and its Member States should develop policies that address migration, foreign policy and development objectives more coherently.

While some important steps have been taken in the creation of a common migration policy, the work is far from done. The balance between internal and external interests, between a migration and security approach, is still not reached. Nevertheless, for the topic of the underlying study, it is relevant to examine how the evolution to more dialogue and partnership with third countries, the growing interest in legal labour migration and in mainstreaming migration into development policies could work for the issue of environment-induced migration. The next Section will therefore address whether and how the growing international interest in environment-induced population movements is reflected at the EU policy level.

¹¹⁷⁰ P. Devisscher, ‘Legal Migration in the Relationship Between the European Union and ACP Countries: The Absence of a True Global Approach Continues’, 13 *European Journal of Migration and Law* 1, 2011, p. 63-64.

¹¹⁷¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘The Global Approach to Migration and Mobility’, COM(2011) 743 final, Brussels, 18 November 2011, available at: <http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Q0nkSq1Q3tTFKk1SfwDB64sQqGnNJgYGybpQRsf1dCy3KBJWMJrg!-1784884970?nodePath=/EU+Projects/Communication+from+the+Commission.pdf&fileName=Communication+from+the+Commission.pdf&fileType=pdf>, p. 3-4.

¹¹⁷² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘The Global Approach to Migration and Mobility’, COM(2011) 743 final, Brussels, 18 November 2011, available at: <http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Q0nkSq1Q3tTFKk1SfwDB64sQqGnNJgYGybpQRsf1dCy3KBJWMJrg!-1784884970?nodePath=/EU+Projects/Communication+from+the+Commission.pdf&fileName=Communication+from+the+Commission.pdf&fileType=pdf>, p. 4.

2. EUROPEAN POLICY REGARDING ENVIRONMENT-INDUCED MIGRATION

2.1. Emergence of environment-induced migration as a new European policy concern

Environment-induced migration is a relatively new topic on the EU policy agenda. When in the late 1990s discussions began on the development of the Qualification Directive, the drafters seemed to be already aware of the issue. The European Council even asked the Member States whether the new instrument should also cover “environmental disasters”¹¹⁷³. In 2002, the European Parliament issued a report on the proposal for the Qualification Directive, in which it called for the development of “appropriate instruments and policies of prevention” with regard to environment-induced displacement. According to the Parliament, this “should provide step 2 of a Common European Asylum Policy”¹¹⁷⁴. However, despite these calls, Member States did not support the inclusion of environment-induced displacement as a ground for subsidiary protection in the Qualification Directive (*see above in Chapter III, Section 2.2.1.*)¹¹⁷⁵.

For a long time, environment-induced population movements were not a policy priority for the EU¹¹⁷⁶. However, the Union is now slowly starting to address the issue. The first signs of the emergence of environment-induced migration as a new European policy concern date back to the beginning of the new millennium. The Commission first mentioned the issue in a Green Paper on adaptation to climate change in 2007¹¹⁷⁷. In March 2008, High Representative Javier Solana and

¹¹⁷³ Council of the European Union, ‘Discussion Paper on subsidiary protection’, 13167/99, 19 November 1999, Asile 41; V. Kolmannskog, ‘Climate change-related displacement and the European response’, Paper presented at SID Vijverberg Session on Climate Change and Migration, The Hague, 20th January 2009; V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 319.

¹¹⁷⁴ European Parliament, Report of 8 October 2002 on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001)510 – C5-0573/2001 – 2001/0207(CNS), Committee on Citizen’s Freedoms and Rights, Justice and Home Affairs, Rapporteur: Jean Lambert.

¹¹⁷⁵ V. Kolmannskog and F. Myrstad, ‘Environmental Displacement in European Asylum Law’, 11 *European Journal of Migration and Law*, 2009, p. 319-321.

¹¹⁷⁶ W. Somerville, ‘PD17: Environmental migration governance: debate in the European Union’, review commissioned as part of the UK Government’s Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 6-7.

¹¹⁷⁷ European Commission, Green Paper from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on ‘Adapting to climate change in

commissioner Ferrero-Waldner released a joint report on 'Climate Change and International Security', in which they highlighted migration as a result of climate change¹¹⁷⁸. The paper advocated that the EU should "consider environmentally-triggered additional migratory stress in the further development of a comprehensive European migration policy"¹¹⁷⁹. However, similar to the discussion on environment-induced migration at the international level (*see above in Chapter I, Section 2.1.1.*), the report adopts without question a much criticised forecast on the expected number of environment-induced migrants, and is grounded in a security debate, where the fear of "millions" of "environmental migrants" coming to the European territory, could, together with increased political instability and conflicts, threaten international and European security¹¹⁸⁰.

Similarly, in a White Paper of 2009 on climate change adaptation the European Commission argued that climate migration "should also be considered in the broader EU reflection on security, development and migration policies"¹¹⁸¹. In a reaction to this White Paper, the European Parliament also stressed that "environmental migration should be taken into account in the long-term planning of development assistance policy"¹¹⁸². The issue was more considered as a threat to Europe's security and border policy, than as a form of migration that could and should be incorporated into the EU's immigration law and policy. In 2010, the Commission did not even mention environment-induced population movements in a Communication on the prevention of natural and man-made disasters¹¹⁸³. However, reacting to this Communication, the Parliament did call "for better protection

Europe – options for EU action', COM(2007) 354 final, Brussels, 29 June 2007, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0354en01.pdf, p. 21-22.

¹¹⁷⁸ High Representative for the Common Foreign and Security Policy and the European Commission, Paper from the High Representative and the European Commission to the European Council on 'Climate Change and International Security', S113/08, Brussels, 14 March 2008, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf, p. 4.

¹¹⁷⁹ High Representative for the Common Foreign and Security Policy and the European Commission, Paper from the High Representative and the European Commission to the European Council on 'Climate Change and International Security', S113/08, Brussels, 14 March 2008, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf, p. 10.

¹¹⁸⁰ High Representative for the Common Foreign and Security Policy and the European Commission, Paper from the High Representative and the European Commission to the European Council on 'Climate Change and International Security', S113/08, Brussels, 14 March 2008, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf, p. 4, 6.

¹¹⁸¹ European Commission, White Paper on 'Adapting to climate change: Towards a European framework for action', Brussels, COM(2009)147/4, available at: http://ec.europa.eu/health/ph_threats/climate/docs/com_2009_147_en.pdf, p. 16-17.

¹¹⁸² European Parliament, Resolution of 6 May 2010 on the Commission White Paper: 'Adapting to climate change: Towards a European framework for action', *Official Journal* C 81 E/115 of 15 March 2011, § 81.

¹¹⁸³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'A Community approach on the prevention of natural and man-made disasters', Brussels, 23 February 2009, COM(2009) 82 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0082:FIN:EN:PDF>.

and resettlement of ‘climate refugees’¹¹⁸⁴. During the past years, several MEPs, in particular among green parties, have organised various seminars on climate- and environment-induced human mobility¹¹⁸⁵. In July 2011, the Council Conclusions on EU Climate Diplomacy again drew attention to the fact that climate change is a global environmental and development challenge, having significant implications to security and migratory pressures¹¹⁸⁶.

In 2010, the Council eventually invited the Commission in the Stockholm Programme “to present an analysis on the effects of climate change on international migration, including its potential effects on immigration to the Union”¹¹⁸⁷. As a result, the issue appeared in the working programme of the Commission in 2011. The Commission subsequently organised a targeted consultation on climate-induced migration, of which the outcome was supposed to be included into the communication package on the revision of the Global Approach to Migration. The same year, the Commission furthermore issued a Communication on the Global Approach to Migration and Mobility, in which it recognised climate change as a push factor for migration. According to the Commission, addressing environment-induced migration, including migration as a strategy to adapt to the adverse effects of climate change, had to be considered as part of the new Global Approach to Migration and Mobility¹¹⁸⁸. However, it is clear that the issue still remained a minor issue in the Commission’s policy programme. In fact, the only priority seemed to be to avoid any connection of environment-induced population movements to the EU’s asylum policy¹¹⁸⁹.

¹¹⁸⁴ European Parliament, Resolution of 21 September 2010 on the Commission communication: A Community approach on the prevention of natural and man-made disasters, *Official Journal* C 50 E/30 of 21 February 2012, § 12.

¹¹⁸⁵ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 6.

¹¹⁸⁶ European Council, Council Conclusions on EU Climate Diplomacy, 3106th Foreign Affairs Council Meeting, Brussels, 18 July 2011, available at: http://ec.europa.eu/clima/events/0052/council_conclusions_en.pdf, § 1.

¹¹⁸⁷ European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’, Brussels, 16 October 2009, *Official Journal* C 115/1-38 of 4 May 2010, p. 29.

¹¹⁸⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘The Global Approach to Migration and Mobility’, COM(2011) 743 final, Brussels, 18 November 2011, available at: <http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Q0nkSq1Q3tTFKk1SfwDB64sQqGnNJgYGybpQRsf1dCy3KBJWMJrg!-1784884970?nodePath=/EU+Projects/Communication+from+the+Commission.pdf&fileName=Communication+from+the+Commission.pdf&fileType=pdf>, p. 6-7.

¹¹⁸⁹ W. Somerville, ‘PD17: Environmental migration governance: debate in the European Union’, review commissioned as part of the UK Government’s Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 7.

In the meantime, the European Parliament also requested a study on environment-induced migration and the possible legal and policy responses to this phenomenon¹¹⁹⁰. The study assesses to what extent the current EU framework for immigration and asylum already offers an adequate response to climate change-induced migration. It also clarifies in which way a modified legal framework can be rooted in the Lisbon Treaty and the Charter of Fundamental Rights of the EU (*see further below in Chapter VII*).

2.2. European Commission Staff Working Document

As the Commission rightly puts, the EU is now “gradually moving from supporting research to also identifying policies and strategies for responding to the impact of environmental change on migration”¹¹⁹¹. Subsequent to the Council’s request in the Stockholm Programme, the Commission organised a consultation process involving various stakeholders, including representatives of EU Member States and partner countries, and non-state actors such as the academic community and NGO’s working on the topic. In order to collect the latest thinking on the topic and share ideas, the Commission organised a number of expert consultations. In July and September 2011, two roundtables were organised with the support of the International Centre for Migration Policy Development (ICMPD) and Foresight, respectively on migration as an adaptation strategy and on the development impacts of environment-induced migration¹¹⁹².

According to Kristian Schmidt, Director for Human and Society Development at the Directorate General (DG) for Development and Cooperation, this reflection within the Commission proved to be “a challenging task”, among others due to the horizontal character of the topic, cutting across

¹¹⁹⁰ A. Kraler, T. Cernei and M. Noack, “‘Climate Refugees’: Legal and Policy Responses to Environmentally Induced Migration’, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at:

<http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>.

¹¹⁹¹ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 6.

¹¹⁹² European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 7.

development, adaptation, humanitarian aid and migration policies¹¹⁹³. Consequently, different relevant departments were involved in the process, including the DGs for Home Affairs, Development and Cooperation, Climate Action and Humanitarian Aid and Civil Protection (*see further in Chapter VII, Section 1*).

The conclusions of this consultation process were included in the Commission's final outcome document, which became, unlike it was intended, a Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the Commission's Communication on 'An EU Strategy on adaptation to climate change'¹¹⁹⁴. Although the Commission had announced a Communication on the subject, the long-expected document eventually turned out to be "just" a Staff Working Paper. According to the ICMPD, this meant that it was only a "reflection document, which, by its nature, will not put forward policy recommendations" on this issue¹¹⁹⁵. Even though the expectations for the result of the Commission's work were quite low, the Staff Working Paper became an interesting document, in particular since it contains the first ever complete reflection on the topic at the EU policy level.

The Staff Working Document draws strongly on the results of the UK's Foresight research, which was published in October 2011 (*see above in Chapter I*)¹¹⁹⁶. It provides an overview of the existing research and data on the nexus between climate change, environmental degradation and migration, and underlines the importance of giving more attention to the environmental drivers of migration in European migration law and policy. Drawing on this large body of existing research findings, the Commission puts some promising elements forward. It provides for instance an analysis of the existing EU instruments that could be relevant to address environment-induced population movements. Furthermore, the working paper gives an overview of the initiatives which are being taken by the EU in various relevant policy areas, such as development, foreign policy and

¹¹⁹³ International Centre for Migration Policy Development (ICMPD), Migration and Environment Newsletter, Issue 2, June 2013, available at: <http://img.mp31.ch/visu-6D712902-D4E3-4772-AF8A-1B7FCEB75B52-195464681-259289-11062013.html>

¹¹⁹⁴ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on 'An EU Strategy on adaptation to climate change', SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf.

¹¹⁹⁵ International Centre for Migration Policy Development (ICMPD), Migration and Environment Newsletter, Issue 1, March 2013, available at: <http://img.mp31.ch/visu-770BF7DC-E274-4E54-B07F-5D7E5447B9C4-177055304-236374-28032013.html>.

¹¹⁹⁶ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on 'An EU Strategy on adaptation to climate change', SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 7.

humanitarian aid. Such measures include for example the support of research on the issue, as well as measures to increase resilience and improve emergency responses to reduce displacement risks¹¹⁹⁷. According to the Commission, migration should be better taken into account in policies and initiatives for disaster risk reduction and climate change adaptation¹¹⁹⁸.

Importantly, the Commission also promotes migration itself as an adaptation strategy, including through measures promoting well-managed legal migration, as well as through relocation measures to help ‘trapped populations’¹¹⁹⁹. The Commission provides concrete examples of how migration has the potential to contribute to the adaptive capacity of certain communities, for instance through remittances and diaspora contributions strengthening the resilience of vulnerable communities in affected regions of origin. It even goes so far as to assert that international population movements should be facilitated in this context. More in particular, the Commission states that it will “explore how future initiatives on labour migration and mobility could be more specifically targeted towards regions at risk of climate change or environmental degradation”¹²⁰⁰. The next Chapter will discuss more in detail how such initiatives could take form.

The Commission’s Staff Working Document has not fully met the expectations. While the Document certainly has the merit of comprehensively addressing the issue, combining different relevant EU policy areas, it did not provide for concrete policy recommendations on how to address the environmental drivers of international population movements in the EU’s migration law and policy. In addition, the fact that the result of the Commission’s reflection only made it into a Staff Working Document symbolises the low priority which the EU still attaches to the issue of environment-induced migration. Moreover, the Document accompanied a Commission Communication on the EU Adaptation Strategy, rather than on the Global Approach to Migration (it was developed by the DG

¹¹⁹⁷ International Centre for Migration Policy Development (ICMPD), Migration and Environment Newsletter, Issue 2, June 2013, available at: <http://img.mp31.ch/visu-6D712902-D4E3-4772-AF8A-1B7FCEB75B52-195464681-259289-11062013.html>

¹¹⁹⁸ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 35.

¹¹⁹⁹ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 26-29.

¹²⁰⁰ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 28.

Development and Cooperation instead of the DG Home Affairs)¹²⁰¹. Nevertheless, even though it is regrettable that the DG Home Affairs does not pay more attention to environment-induced migration, this change in responsibility also offers the opportunity to address the issue in a more comprehensive way, taking all relevant policy areas into account. An important symbolic step has been taken, as the Staff Working Document on 'Climate change, environmental degradation, and migration' certainly has the potential to further the debate at the EU and national policy level¹²⁰².

2.3. Follow-up

The Commission's Staff Working Document of April 2013 has provided us with an outline of the way in which the European Commission wants to address the issue of environment-induced migration. The Commission has now recognised the changing evidence base on environment-induced migration, and suggests a more considered and integrated policy approach¹²⁰³. It remains to be seen how things will move forward at the EU policy level after this publication. In particular as regards international adaptive migration, more reflection is needed on how to foster greater mobility to promote and facilitate migration as an adaptation strategy.

The Staff Working Document should thus lead to further high level dialogue, leading to the development of concrete actions and tools to facilitate international adaptive migration. By outlining the relevant EU measures which have been taken so far to address environment-induced migration, the Commission's Document can hopefully take the policy agenda forward at the European level. The European Parliament could for example develop an official response to the Commission's Document, reflecting the position of the whole Parliament¹²⁰⁴.

¹²⁰¹ A. Geddes and W. Somerville, 'Migration and environmental change: Assessing the developing European approach', Policy Brief Series, Issue No. 2, Migration Policy Institute (MPI) Europe, May 2013, available at: <http://www.migrationpolicy.org/pubs/MPIEurope-EnvironmentalMigration.pdf>, p. 3.

¹²⁰² International Centre for Migration Policy Development (ICMPD), Migration and Environment Newsletter, Issue 2, June 2013, available at: <http://img.mp31.ch/visu-6D712902-D4E3-4772-AF8A-1B7FCEB75B52-195464681-259289-11062013.html>.

¹²⁰³ A. Geddes and W. Somerville, 'Migration and environmental change: Assessing the developing European approach', Policy Brief Series, Issue No. 2, Migration Policy Institute (MPI) Europe, May 2013, available at: <http://www.migrationpolicy.org/pubs/MPIEurope-EnvironmentalMigration.pdf>.

¹²⁰⁴ International Centre for Migration Policy Development (ICMPD), Migration and Environment Newsletter, Issue 1, March 2013, available at: <http://img.mp31.ch/visu-770BF7DC-E274-4E54-B07F-5D7E5447B9C4-177055304-236374-28032013.html>.

In its Communication on ‘Maximising the Development Impact of Migration’ of May 2013, the European Commission has presented its views on how migration can contribute to economic and social development and how global cooperation in this area should be strengthened¹²⁰⁵. It was meant to provide the basis for a common position of the EU and its Member States at the High-level Dialogue on International Migration and Development, which was organised by the UN General Assembly in October 2013. In its Communication, the Commission builds on its Staff Working Document on environment-induced migration, and recognises the important contributions which migration could make to adaptation¹²⁰⁶. According to Kristian Schmidt, Director for Human and Society Development at the DG for Development and Cooperation, the Commission hereby “fully integrates environmentally induced migration into the EU agenda on development and migration”¹²⁰⁷. The Commission declares to “ensure that future EU action on migration and development becomes truly comprehensive, addressing the full range of positive and negative impacts of the various forms that migration can have on sustainable economic, social and environmental development”. This requires a variety of measures, including

“[f]urther exploring and addressing the links between climate change, environmental degradation and migration, including the importance of climate change adaptation and Disaster Risk Reduction (DRR) in reducing displacement, and the role of migration as a strategy to strengthening adaptation and DRR”¹²⁰⁸.

¹²⁰⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘Maximising the Development Impact of Migration’, The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus, COM(2013) 292 final, Brussels, 21 May 2013, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/maximising_the_development_impact_of_migration.pdf.

¹²⁰⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘Maximising the Development Impact of Migration’, The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus, COM(2013) 292 final, Brussels, 21 May 2013, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/maximising_the_development_impact_of_migration.pdf, p. 4, 12.

¹²⁰⁷ International Centre for Migration Policy Development (ICMPD), Migration and Environment Newsletter, Issue 2, June 2013, available at: <http://img.mp31.ch/visu-6D712902-D4E3-4772-AF8A-1B7FCEB75B52-195464681-259289-11062013.html>.

¹²⁰⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘Maximising the Development Impact of Migration’, The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus, COM(2013) 292 final, Brussels, 21 May 2013, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/maximising_the_development_impact_of_migration.pdf, p. 12.

Also in May 2013, after more than a year of drafting and negotiating, the GREENS/EFA group in the European Parliament adopted a common Position Paper on climate change, refugees and migration¹²⁰⁹. It favours, among others, adopting a pragmatic approach to the issue of terminology, using the terms 'climate migration' and 'climate refugees', and calls on the EU to take a leading role in this issue, for instance by creating more legal migration options to the EU for environmentally-affected people¹²¹⁰. It thus seems that European policymakers are now becoming more interested in giving the issue of environment-induced migration the appropriate attention in the years to come, mainly in the context of the linkage between migration and development.

¹²⁰⁹ The Greens/EFA in the European Parliament, Position Paper on 'Climate Change, Refugees and Migration', Drafted by Hélène Flautre, Jean Lambert, Ska Keller and Barbara Lochbihler, May 2013; E-mail received by Raphael Kreusch on 'Greens in the EP adopt Position Paper on climate refugees', 28 June 2013.

¹²¹⁰ The Greens/EFA in the European Parliament, Position Paper on 'Climate Change, Refugees and Migration', Drafted by Hélène Flautre, Jean Lambert, Ska Keller and Barbara Lochbihler, May 2013, p. 12.

Chapter VII. Facilitating adaptive migration in the European Union's law and policy framework

“Freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory”.

Conclusions of the European Council Presidency, Tampere (Finland), 15-16 October 1999.

The previous Chapter focused on the actual policy developments in the EU regarding environment-induced migration. This final Chapter assesses how concrete policies in the field of adaptive migration could take form in the future. The aim is to conceptualise adaptive migration within some of the current governance frameworks and policy tools in the EU's migration law and policy, and to identify ways to begin bridging the existing legal and policy gaps regarding international adaptive migration. These policy tools will not be examined in depth. Instead, the intention is to provide a starting point for further research. After all, it is my belief that the conceptualisation of adaptive migration within European migration policies can take the debate an important step further. As Geddes and Somerville have rightly put, “the European Union could play an important role in ensuring that promoting migration – as part of an integrated, development-oriented response – is a valid and important element of policy solutions” in the context of migration and environmental change¹²¹¹.

In contrast to Chapter III, which briefly addresses the EU's legal and policy framework on asylum in relation to environment-induced *displacement*, this Chapter focuses on the EU's policies regarding *legal migration*, and more in particular regarding the immigration of third country nationals. It envisages the development of recommendations regarding migration schemes that would provide

¹²¹¹ A. Geddes and W. Somerville, ‘Migration and environmental change: Assessing the developing European approach’, Policy Brief Series, Issue No. 2, Migration Policy Institute (MPI) Europe, May 2013, available at: <http://www.migrationpolicy.org/pubs/MPIEurope-EnvironmentalMigration.pdf>, p. 2.

legal migration opportunities to individuals or groups of persons affected by environmental degradation in their home countries.

According to Kälin and Schrepfer, the basis for a more active EU policy approach towards environment-induced migration could be found in Article 10A of the Lisbon Treaty, according to which the Union is committed to “work for a high degree of cooperation in all fields of international relations”, *inter alia*, “in order to: (...) assist populations, countries and regions confronting natural or man-made disasters”¹²¹². However, as this provision does not explicitly address the admission of third country nationals, Article 79 TFEU is also of obvious relevance (*see above in Chapter VI, Section 1.2.*). This provision grants the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, the competence to adopt measures regarding, *inter alia*, “the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits”¹²¹³.

1. INSTITUTIONAL COOPERATION TO ADDRESS INTERNATIONAL ADAPTIVE MIGRATION

Before the EU policy frameworks regarding immigration can be discussed in the context of migration as an adaptation strategy, it is relevant to briefly touch upon the institutional competences of different EU actors in this context. While migration was traditionally considered to be the exclusive domain of Justice and Home Affairs (JHA), its external dimension has now introduced new relevant actors into the field, for instance in the area of foreign affairs policies and development cooperation¹²¹⁴. The Global Approach to Migration and Mobility confirmed the need for inter-

¹²¹² Article 10A(g), Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, entered into force on 1 December 2009, *Official Journal* C 306 of 17 December 2007; W. Kälin and N. Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’, UNHCR Legal and Protection Policy Research Series, PPLA/2012/01, Division of International Protection, February 2012, available at: [http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4f33f1729&query=Protecting People Crossing Borders in the Context of Climate Change](http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4f33f1729&query=Protecting+People+Crossing+Borders+in+the+Context+of+Climate+Change), p. 47-48.

¹²¹³ Article 79(a) TFEU.

¹²¹⁴ C. Cournil et al., ‘Human Rights and Climate Change : EU Policy Options’, Study requested by the European Parliament’s Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 64.

sectoral cooperation between those different policy fields. However, the cooperation between different relevant domains in the field of migration has proved to be difficult, partly due to different priorities of the European Council and the Commission, as well as different objectives within the Commission between the relevant DG's concerned with the external dimension of the EU's migration policy. For example the institutionalisation of the migration-development nexus in the EU's policy structure has proved to be more difficult than what seemed at first sight. On the one hand, the Commission's more innovative view regarding migration and development is not always shared by the Council, which is still dominated by the Member States' internal concerns to limit immigration. On the other hand, within the Commission, each DG has different insights and practices, depending on their mandate and the interests of their stakeholders¹²¹⁵.

The issue of environment-induced migration is typically an issue where the need for inter-sectoral cooperation is highly present. More in particular international adaptive migration is crosscutting a myriad of policy fields, such as development policy, adaptation responses and migration policy. As the issue is situated on the intersection between those different policy areas, the coordination and cooperation between different DG's within the Commission, such as the DG Home Affairs (HOME), the DG EuropeAid Development and Cooperation (DEVCO), the DG Humanitarian Aid and Civil Protection (ECHO), the DG Climate Action (CLIMA) and the European External Action Service (EEAS), is crucial. However, as the institutionalisation of the migration-development nexus caused some difficulties, it is to be expected that the same will hold true for the case of environment-induced migration in general and adaptive migration in particular.

In 2010 and 2011, both the Council¹²¹⁶ and the Commission¹²¹⁷ defined environment-induced migration as an issue to be considered as part of the external dimension of the EU's migration policy. However, not only was it left unclear which policy actors needed to act, the already existing lack of coordination between different actors dealing with the externalisation of migration was even further

¹²¹⁵ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at:

<http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 64.

¹²¹⁶ European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens', Brussels, 16 October 2009, *Official Journal* C 115/1-38 of 4 May 2010, p. 29.

¹²¹⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'The Global Approach to Migration and Mobility', COM(2011) 743 final, Brussels, 18 November 2011, available at:

<http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Q0nkSq1Q3tTFKk1SfwDB64sQqGnNJgYGybpQRsf1dCy3KBJWMJrg!-1784884970?nodePath=/EU+Projects/Communication+from+the+Commission.pdf&fileName=Communication+from+the+Commission.pdf&fileType=pdf>, p. 6-7.

complicated by adding another policy field to the debate, namely environmental and climate change policies¹²¹⁸.

As a result of its leading role on the external dimension of migration, the DG HOME was quickly considered as the leader on environment-related migration, despite its lack of experience in environmental issues¹²¹⁹. However, while environment-induced migration is for the EU an international issue, where cooperation with third countries will be crucial for the effective implementation of migration as an adaptation strategy, the DG Home Affairs remains dominated by internal considerations, mostly reacting to the internal (security) concerns of the EU Member States. Another problem was the fact that the DG HOME regarded climate-induced migration in first instance as a problem, which only required environmental and development measures *in situ*, and it did not see an important role to be played for Justice and Home Affairs.

In a study of Cournil *et al.*, requested by the European Parliament's Subcommittee on Human Rights in the DG for External Policies, some proposals were put forward to better integrate climate-induced migration into the EU's policy structure. For the above mentioned reasons, the study argues that the DG Home Affairs should not be given the lead role for tackling environment-induced migration. Instead, Council *et al.* argue that "the development sector could strengthen policy making in this field"¹²²⁰. Indeed, the DG DEVCO was already concerned with both climate change and migration as separate issues that might affect development in third countries. The DG CLIMA on the other hand has become involved in the discussions on the elaboration of the Global Approach to Migration and Mobility since climate change has been recognised by the Stockholm Programme as a root cause of migration. However, when it concerns the entry and residence of third country nationals affected by environmental degradation or natural disasters, touching the core business of the DG Home Affairs, the latter cannot be disregarded.

¹²¹⁸ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 63-64.

¹²¹⁹ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 60-61

¹²²⁰ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 11.

It is important to note that target countries of the development vs. the migration sector are different. The countries which are subject to the DG DEVCO's development policies are not necessarily the same as those which are the focus of the DG Home Affairs' migration cooperation, which is mainly determined by the EU's internal considerations. Furthermore, both the development and the external affairs sector have been concerned about the misrepresentation of their own objectives in case migration considerations would have to be included¹²²¹. Similar questions could thus be posed if migration considerations would have to be factored into environmental policies, or if adaptation goals would have to be included in migration policymaking. These diverging policy objectives do render cooperation between different policy actors more difficult, but the challenge of bringing them together can also lead to new opportunities and to innovative thinking on environment-induced migration and the policy measures needed to confront the issue.

In response to the Council's request in the Stockholm programme, the DG HOME created a multi-sectoral working group to analyse the effects of climate change on international migration, including its effects on immigration to the EU. However, the result of this analysis, which turned out to be the Staff Working Document on 'Climate change, environmental degradation, and migration', was eventually published as part of the 'EU Strategy on adaptation to climate change', instead of being part of the Global Approach to Migration and Mobility, as the original aim was. In my opinion, this indicates a change of thinking on the institutional venue to address the issue of environment-induced migration at the EU policy level, or at least a change in the leading role of the DG HOME. According to a DG HOME official, their analysis corresponded mainly to development issues, and they were therefore wondering whether the Global Approach to Migration and Mobility was the most suited framework to address the issue¹²²².

Whatever the solution of this institutional division is, it is clear that policies on environment-induced migration, and in particular on adaptive migration, can only be successful if the development, the environmental and the migration sector cooperate in order to deal with the issue in a coherent and

¹²²¹ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 64.

¹²²² C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 67.

comprehensive way, at the international as well as on the EU policy level. As Cournil *et al.* propose, a permanent inter-agency *ad hoc* working group might be a way to achieve this objective¹²²³.

2. INTERNATIONAL ADAPTIVE MIGRATION AND THE GLOBAL APPROACH TO MIGRATION AND MOBILITY

As discussed in Chapter VI, the Global Approach to Migration and Mobility is the overarching framework of the EU's external migration policy. It is the Union's framework for dialogue and cooperation with non-EU countries of origin, transit and destination, and aims to enable migration and asylum issues to be addressed more comprehensively. Among its priorities are the improvement of the organisation of legal migration and facilitated mobility, the prevention and reduction of irregular migration in an efficient, yet humane way, and the strengthening of synergies between migration and development. With these priorities in mind, it is interesting to discuss what the added value of this Global Approach to Migration and Mobility is for the facilitation of international adaptive migration.

As mentioned above, the Commission recognised climate change as a push factor for migration in 2011, arguing that environment-induced migration had to be considered as part of the new Global Approach to Migration and Mobility¹²²⁴. In May 2012, the European Council, in its conclusions on this Global Approach, recognised “the need to further explore the linkages between climate change, migration and development, including the potential impact of climate change on migration and displacement”¹²²⁵. While the Commission Staff Working Document of April 2013 was eventually not

¹²²³ C. Cournil et al., ‘Human Rights and Climate Change : EU Policy Options’, Study requested by the European Parliament’s Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 69.

¹²²⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘The Global Approach to Migration and Mobility’, COM(2011) 743 final, Brussels, 18 November 2011, available at: <http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Q0nkSq1Q3tTFKk1SfwDB64sQqGnNJgYGybpQRsf1dCy3KBJWMJrg!-1784884970?nodePath=/EU+Projects/Communication+from+the+Commission.pdf&fileName=Communication+from+the+Commission.pdf&fileType=pdf>, p. 6-7.

¹²²⁵ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on*

included in a communication package on the Global Approach to Migration and Mobility, the European institutions seemed to be willing to discuss the linkage between environmental degradation and migration within the framework of the Global Approach. Likewise, some scholars had expressed an interest in the Global Approach to Migration and Mobility in the context of environment-induced migration¹²²⁶.

However, the externalisation of the EU's migration policy is still suffering from many shortcomings. Despite the recognition of the benefits migration can bring to both sending and receiving countries, the focus of the EU countries' policies still lies on the control and reduction of migratory movements and the fight against irregular migration, while the root causes leading people to migrate from their regions of origin are still not addressed. In this sense, internal EU considerations might even act as a barrier for the inclusion of environment-induced migration into European policy processes. Nonetheless, the development of the Global Approach to Migration and Mobility has certainly brought about important policy changes that could be relevant for the facilitation of international migration as an adaptation strategy, in particular concerning the migration and development nexus¹²²⁷.

When reflecting on the policy measures needed to support and promote migration as an adaptation strategy, the EU can indeed learn lessons from the experience gained while implementing the Global Approach to Migration and Mobility. As the Commission itself acknowledges in its 2013 Staff Working Document, the Global Approach has helped the EU to take measures to maximise the development impact of migration for countries of origin, such as the facilitation of remittance transfers, the

'An EU Strategy on adaptation to climate change', SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 7.

¹²²⁶ See for example A. Geddes and W. Somerville, 'Migration and environmental change: Assessing the developing European approach', Policy Brief Series, Issue No. 2, Migration Policy Institute (MPI) Europe, May 2013, available at: <http://www.migrationpolicy.org/pubs/MPIEurope-EnvironmentalMigration.pdf>, p. 5-6; A. Kraler, T. Cernei and M. Noack, "'Climate Refugees": Legal and Policy Responses to Environmentally Induced Migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen's Rights and Constitutional Affairs, Brussels, 2011, available at:

<http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>; C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 62.

¹²²⁷ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 62.

engagement of the diaspora community in development policies, or the promotion of circular and return migration as development tools¹²²⁸. Such measures can also be part of a comprehensive policy approach to promote and facilitate international adaptive migration. The Commission stated for example that it will explore how initiatives to facilitate remittance transfers could in the future better take the needs of environmentally-affected regions into account, including in the aftermath of sudden natural disasters. Policy measures that specifically target those financial transfers towards investments into adaptation initiatives could be part of such a strategy, for instance by informing the receiving community on how to use remittances to increase their resilience to environmental disruptions¹²²⁹. Another possible tool is the promotion of return migration, particularly for those migrants which have crucial skills and resources to strengthen adaptation in their region of origin¹²³⁰.

One of the key messages that emerges from the Commission's Staff Working Document is thus the call for a better integration of environment-induced migration into development strategies, by using the knowledge, tools and programmes that were set up to support the migration and development-nexus. The fact that the Staff Working Document was tied to the Commission's Communication on adaptation, further matches this effort to integrate diverging policies. What remains now, is the challenge to integrate adaptation in the EU's migration legislation and policies.

Most EU Member States have not installed migration channels for environment-induced migrants, vulnerable communities, or disaster-affected populations in their national legislation. Most migration categories are based on the personal situation of the individual migrant (e.g. procedures for family reunification), or on the situation of the labour market in the destination country (mostly high-skilled labour migration)¹²³¹. In the EU, humanitarian admissions are mostly limited to refugees and persons eligible for subsidiary protection, as categories of displaced persons protected under the EU's *asylum*

¹²²⁸ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 27.

¹²²⁹ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 27.

¹²³⁰ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 27.

¹²³¹ S. Martin, 'Climate Change, Migration and Governance', 16 *Global Governance on Migration* 3, July-September 2010, p. 405.

legislation¹²³². Recognising environmental impacts as a legitimate cause of *migration*, would thus require new and innovative thinking on migration policies. It would mean that, aside from the migrant's personal situation and the socio-economic situation of the destination country, also the living conditions in the region of origin are taken into account. Recognising and admitting certain environment-induced migrants could thus be done either through the creation of new admission categories, either by including a humanitarian factor in existing migration categories, such as through labour migration or family reunification. In an EU where competences regarding the immigration of third country nationals are gradually handed over to the regional level, and where a common European immigration policy is an important objective, this can best be done at the regional level.

In a Position Paper on 'Climate Change, Refugees and Migration' (*see above in Chapter VI, Section 2.3.*), the European Greens for example not only call on the EU to take a leading role on climate-induced migration at the international level, but also to take up the issue at the European level, by including the issue in several European policy instruments¹²³³. However, it is important to realise that such migration mechanisms are, unlike protection mechanisms under European asylum legislation, of an essential political nature, and will require the necessary political will to adopt innovative legislation as part of the EU's immigration framework.

As it is the ambition of the Global Approach to Migration and Mobility to "respond to the challenges of changing migration trends"¹²³⁴, it is now time for the EU to recognise environmental factors as drivers of migration, and to start integrating migration as an adaptation strategy into its migration law and policy. The Global Approach offers potential for the EU to address immigration of third country nationals as a possible adaptation tool. The next Section therefore aims to direct the debate towards constructive thinking on how the EU could more concretely encourage international migration as an adaptation strategy for regions and communities affected by environmental degradation.

¹²³² K. Warner 'European (im)migration policy and environmental change: institutional and governance gaps', 9 *European View* 2, 2010, p. 193.

¹²³³ The Greens/EFA in the European Parliament, Position Paper on 'Climate Change, Refugees and Migration', drafted by Hélène Flautre, Jean Lambert, Ska Keller and Barbara Lochbihler, May 2013, p. 11-12.

¹²³⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'The Global Approach to Migration and Mobility', COM(2011) 743 final, Brussels, 18 November 2011, available at: <http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Q0nkSq1Q3tTFKk1SfwDB64sQqGnNJgYGybpQRsf1dCy3KBJWMJrg!-1784884970?nodePath=/EU+Projects/Communication+from+the+Commission.pdf&fileName=Communication+from+the+Commission.pdf&fileType=pdf>, p. 3.

3. A TOOLBOX OF POLICY MECHANISMS WITHIN THE EU LEGAL AND POLICY FRAMEWORK REGARDING THE IMMIGRATION OF THIRD COUNTRY NATIONALS

3.1. Facilitating legal mobility for environmentally-affected persons

Supporting international migration as an adaptation strategy requires a radical change in policymaking, as it presupposes facilitating migration instead of preventing it. In its Staff Working Paper on ‘Climate Change, Environmental Degradation, and Migration’, the European Commission acknowledges that migration can act as a legitimate adaptation strategy, contributing to the resilience and adaptive capacity of environmentally-affected communities, for instance through diversification of income sources. Consequently, the Commission argues that well-managed legal mobility should be promoted and facilitated, in order to strengthen resilience and reduce risks of displacement or entrapment in highly vulnerable situations¹²³⁵. Although the current European migration framework does not (yet) address environment-induced migration, it is worth to explore how and to what extent the EU could support international adaptive migration by facilitating legal mobility for environmentally-affected persons.

3.1.1. Labour migration for affected communities

One of the possibilities to facilitate legal mobility for environment-induced migrants is to open more migration channels to EU countries through labour migration programmes. According to the European Commission, facilitating labour migration is one of the possible ways to foster greater mobility in promoting migration as an adaptation strategy, as it “can greatly contribute both to

¹²³⁵ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on ‘An EU Strategy on adaptation to climate change’, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 26-29.

creating opportunities for individuals to take advantage of the potential of migration to boost adaptation, and to reducing environmentally induced displacement”¹²³⁶.

In the targeted consultation process on climate-induced migration organised by the European Commission, a range of migration policy options was suggested, including the review of existing labour exchange agreements in order to allow families to diversify their income in response to slow-onset environmental degradation. Participants also agreed that adaptive migration could be supported through development cooperation, “for example through the establishment of service centres for (potential) migrants in order to maximise the impacts of migration on human development”¹²³⁷.

According to the Commission, there is no need to opt for specific migration schemes for environment-induced migrants. Instead, people affected by environmental changes could make use of already existing labour migration programmes, since “some of the most successful examples of schemes which have promoted migration as adaptation have been set up as ‘ordinary’ labour migration schemes”¹²³⁸. Indeed, a programme such as the Temporary and Circular Labour Migration (TCLM) programme between Colombia and Spain has not been created specifically for environment-induced migrants, but has proved to be very relevant in this context (*see above in Chapter II, Section 2.1.*). However, in my opinion, such a passive approach is certainly not sufficient to make labour migration work for the adaptation of communities affected by environmental disruptions. Firstly, the most vulnerable communities often have difficulties to fulfil the conditions to apply for labour migration visa and work permits. Indeed, most labour migration programmes focus on higher qualified workers, or on labour skills which are most needed in the labour markets of host countries. Therefore, a more active EU approach is required, where labour supply and demand are more actively linked to one another. For instance through specific skill-building projects in vulnerable

¹²³⁶ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on ‘An EU Strategy on adaptation to climate change’, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 28.

¹²³⁷ A. Kraler, T. Cernei and M. Noack, “‘Climate Refugees’: Legal and Policy Responses to Environmentally Induced Migration”, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>, p. 49.

¹²³⁸ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on ‘An EU Strategy on adaptation to climate change’, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 28.

communities, persons affected by environmental changes can be assisted to acquire the necessary skills to benefit from labour migration projects, helping them to diversify their income and the income of their families and the wider community.

Furthermore, existing labour migration programmes are often directed towards certain countries of origin, mostly depending on existing migration agreements between host and home countries. Often, countries which are mostly affected by environmental changes are not (yet) part of such migration agreements (*see further below under Section 3.2.*). Moreover, existing labour migration programmes are often targeted at certain groups of beneficiaries. In order to make labour migration channels available to environmentally-affected persons, it is therefore advisable to specifically target such programmes towards communities affected by droughts, sea level rise, sudden-onset natural disasters or other environmental changes. This does certainly not exclude those labour migration programmes from being applicable to other, already existing, targeted beneficiaries. However, as discussed in the previous Chapter, employment-based admissions into EU Member States are generally based on the labour market needs of the receiving Member State, and not on the situation of the home country¹²³⁹. Thus, in order to bring such humanitarian considerations into the EU's labour migration policy, would require an important change of policy thinking.

Finally, environmentally-affected labour migrants should also be guided and assisted during the whole migration process, in order to be better prepared to contribute to the resilience building and adaptive capacity of themselves, their families and communities. Together with 'skill-building' projects, the negotiation of migration agreements with countries mostly affected by environmental changes, and labour migration projects specifically targeting vulnerable and environmentally-affected communities, such policy measures could not only make sure that vulnerable environment-induced migrants can be eligible for labour migration towards EU Countries, but can thereby also effectively contribute to their adaptation to environmental changes.

Discussions regarding the above mentioned policy proposals can build on already existing labour migration programmes which have been used by or oriented towards communities at risk of environmental disruptions, and have demonstrated that facilitating legal mobility can indeed promote the use of international migration as an adaptation strategy. Few examples exist both in the EU, for example in Spain through the TCLM programme, as in non-EU Member States. The Pacific Access Category Programme of New Zealand allows for instance limited permanent labour migration to the citizens of certain vulnerable small island states in the Pacific Ocean (*see above in Chapter I,*

¹²³⁹ K. Warner 'European (im)migration policy and environmental change: institutional and governance gaps', 9 *European View* 2, 2010, p. 193.

Section 1.1.4.1. and Chapter II, Section 2.2). In this regard, the Commission's Staff Working Paper also mentions the interesting example of pastoralists in the Horn of Africa, whose vulnerability might be increased due to limits on cross-border mobility¹²⁴⁰. In 2009, a consortium of organisations such as OCHA, UNEP, and the IOM therefore launched the *Security in Mobility Initiative* on intra-regional cooperation. Recognising the added value of mobility for pastoralist communities in the Horn and East Africa as a strategy to adapt to climate change, the project promotes regional cooperation to facilitate peaceful cross-border migration, aiming to reduce local conflicts¹²⁴¹.

It is crucial that lessons are learned from these examples. Unfortunately, at this point in time, there is not much empirical evidence available to better support the added value of labour migration as an adaptation strategy. Although various pilot projects regarding international (circular) labour migration have been launched, the results have not been studied, some projects were interrupted before the end of the programme, and none of them explicitly targeted environmentally-affected communities in the country of origin. It could thus be recommended to European policymakers to launch and fund pilot projects of labour migration with a specific focus on communities affected by environmental changes, in order to provide more empirical research on the possible development and adaptation benefits of international labour migration to the affected communities.

3.1.2. Circular adaptive migration

In its Staff Working Paper of April 2013, the European Commission not only recognised emigration as a viable adaptation strategy, but, also argued that migrants returning to their country of origin “can substantially contribute to increasing both personal and community resilience, through applying skills acquired during the period of migration and investing the resources earned”¹²⁴². One of the options

¹²⁴⁰ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 29.

¹²⁴¹ United Nations Office for the Coordination of Humanitarian Affairs (UN-OCHA), United Nations Environment Programme (UNEP), International Organization for Migration (IOM) and the Institute for Security Studies (ISS), ‘Security in Mobility: Advocating for Safe Movement as a Climate Change Adaptation Strategy for Pastoralists in the Horn and East Africa’, June 2010, Paper available at: http://reliefweb.int/sites/reliefweb.int/files/resources/8E4A32AF1BCEE2544925775800065831-Full_Report.pdf.

¹²⁴² European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European*

to promote this contribution of returning migrants to their region of origin, is the promotion of circular migration between host and home countries. Through a case study on the Temporary and Circular Labour Migration (TCLM) programme between Colombia and Spain, Chapter II of this thesis has already discussed the possible added value of international circular migration as an adaptation strategy, and has presented some of the legal and policy challenges to facilitate this form of international adaptive migration (*see above in Chapter II, Section 2.1.*). This Section aims to briefly address the possible role of the EU in this context.

3.1.2.1. Circular migration as a viable adaption alternative

Some of the social, political and economic concerns on international labour migration may be alleviated by facilitating and promoting the circularity of migrants. Circular migration schemes are firstly meant to support and facilitate international mobility, without having to permanently leave the country of origin. This way, migrants do not need to sever the ties with their homeland indefinitely, while the country of origin does not have to deal with permanent emigration, hollowing out its economy¹²⁴³. The risk of brain drain can be diminished by allowing migrants to move freely between their host and home country, for example by granting multi-entry visa. Research has also shown that increased international migration of skilled people can lead to a “brain gain” in the country of origin, as it acts as an incentive for others to acquire the same internationally demanded skills¹²⁴⁴. It is furthermore widely recognised by both scholars and policymakers that circular migration contributes to poverty reduction and socio-economic development. By maintaining linkages between migrants and their countries of origin, circular migration turns migrants into agents for development. Similarly, circular migration has the advantage of reducing the social and political costs of permanent immigration for the host country.

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 27.

¹²⁴³ R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, ‘Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate’, in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 48-76; A. Deprez, ‘Climate Migration in Latin America: A Future ‘Flood of Refugees’ to the North?’, Part 2: ‘Hotspot Case Study: Mexico’, Analysis prepared by COHA Research Fellow Alexandra Deprez Blog post of the Council on Hemispheric Affairs, Posted 26 Feb 2010, available at: <http://www.coha.org/climate-migration-in-latin-america-a-future-%E2%80%98flood-of-refugees%E2%80%99-to-the-north-part-2/>, 2010.

¹²⁴⁴ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 184.

In case of environmental disruptions, circular migration has added benefits as a coping strategy, both in reaction to gradual environmental degradation and to sudden natural hazards. It offers a more durable solution for countries severely affected by environmental disruptions, as it reduces the risk of brain drain, and can even lead to a brain gain. In case of sudden environmental disruptions, temporary legal protection for displaced persons, coupled to return programmes supporting the reintegration of the victims into their region of origin (*see further below in Section 3.4.*), can prevent natural *hazards* from becoming natural *disasters*. In reaction to gradual environmental degradation, circular (labour) migration can increase the resilience of affected communities. In particular in case of land degradation and desertification, circular and seasonal migration is recognised as an important strategy of income diversification. Where people rely heavily on rain-fed agriculture, circular migration acts as an effective strategy to react to recurring droughts and changes in rain patterns¹²⁴⁵. It is expected that due to climate change, these existing *de facto* circular migration patterns, which often imply internal or regional migration to neighbouring countries, will in the future become insufficient as a coping strategy to deal with slow-onset environmental degradation. International circular migration could thus alleviate this shortcoming of traditional circular migration patterns. The question then rises if and how the EU could contribute to the adaptation of environmentally-affected communities through the facilitation of longer-distance circular migration.

3.1.2.2. Facilitating circular adaptive migration

A. The TCLM programme as a “Model for Consolidation and Replication”?

Chapter II has illustrated the possible added value of international circular migration in the context of environmental changes through a case study of the TCLM programme between Colombia and Spain. Various authors have argued that through this innovative migration model, Colombians facing recurring natural disasters can be offered a livelihood alternative through temporary work abroad, while the affected regions of origin could recover¹²⁴⁶. By actively supporting the participating

¹²⁴⁵ C. Tacoli, ‘Crisis or adaptation? Migration and climate change in a context of high mobility’, 21 *Environment and Urbanization* 2, 2009, p. 7.

¹²⁴⁶ See for example R. Engelman, ‘The State of World Population 2009: Facing a Changing World: Women, Population and Climate Change’, United Nations Population Fund (UNFPA), 2009, available at: http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf, p. 36; T. Rinke, ‘Temporary and Circular Labor

migrants in maximising the impact of remittances on the recuperation of their place of origin, the TCLM programme could indeed contribute to resilience building in the communities of origin.

In a Communication to the European Council, the European Commission has presented this project as a “model for consolidation and replication”¹²⁴⁷. Through its financial help by the AENEAS programme, the EU even supported the further implementation and consolidation of the initial project of the Unión de Pagesos between 2007 and 2009. In its Communication, the Commission proposed ways to integrate legal migration opportunities into the Union's external policies, and to facilitate circular and temporary migration as a tool that can both address labour needs in EU Member States and maximise migration benefits for countries of origin.

However, in order for the TCLM programme to become a replicable model, some concerns need to be taken into account (*see Chapter II, Section 2.1.6.*). As already discussed in Chapter II, the political, economic and institutional context of both host and home region are important factors in the implementation of any labour migration programme. Measures are for example needed to reduce the risk of brain drain for the country of origin, as mass emigration of skilled people might even diminish a country's adaptive capacity when it is confronted with environmental degradation. As mentioned above, the risk of brain drain can however be reduced by facilitating the circularity of migrants, for example by granting them multi-entry visa to move freely between host and home communities. When migrants are encouraged to return to their native countries, temporarily or permanently, they can contribute positively, by transferring money and skills, or even by carrying knowledge on climate change adaptation and disaster risk reduction with them. Host countries could furthermore invest in the up-skilling of communities of origin, which would then create better migration opportunities and more chances for the transfer of remittances¹²⁴⁸. In the by sea level rise

Migration between Spain and Colombia', in F. Gemenne, P. Brückner and D. Ionesco, *The State of Environmental Migration 2011*, IDDRI SciencesPo and the International Organisation for Migration (IOM), Study November 2012, Paris, 2012, available at: <http://www.iddri.org/Publications/The-State-of-Environmental-Migration-2011>; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010.

¹²⁴⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Circular migration and mobility partnerships between the European Union and third countries' COM(2007) 248 final, Brussels, 16 May 2007, not published in the *Official Journal*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0248:FIN:EN:PDF>, p. 21-22.

¹²⁴⁸ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 31; Foresight, *Migration and Global Environmental Change*.

threatened island nation Kiribati for example, increased investments in education were meant to serve this goal¹²⁴⁹.

One of the often mentioned critiques on temporary and circular migration programmes is the lack of legal protection for temporary labour migrants¹²⁵⁰. Respect for migrant's fundamental rights is thus a *conditio sine qua non* for the implementation of humane and efficient labour migration programmes, in particular when it concerns temporary and circular migration. As the temporariness of their stay might increase their vulnerability, temporary migrants are indeed often subject to exploitation and discrimination. It is therefore important to ensure them equal rights and entitlements as local workers. The extent to which migrants and their communities benefit from the migration experience depends for a large part on these entitlements, including access to health care and education, political and economic freedoms, and the right to move in and out of the host country. In particular temporary labour migrants require assistance to reduce the costs of migration, including assistance with visa procedures, housing, and public services. Furthermore, by reducing the cost of remittance transfers, the merits of migration for their families and communities of origin can be maximised¹²⁵¹. Another important concern that has been raised is the risk of circumvention of circular migration programmes. Measures are thus needed in order to guarantee the return of circular workers, for instance through the issuance of multiple entry-visa, or by easing immigration restrictions after a previous successful return. Furthermore, measures to support integration in the host community are part of a comprehensive migration policy, even in case of circular migration projects.

If these concerns are taken into account, the TCLM programme can indeed be promoted as a good practice of circular labour migration in response to changing environmental conditions. While gaps in

Future Challenges and Opportunities, Final Project Report, The Government Office for Science, London, 2011, p.22, 179, 183-184.

¹²⁴⁹ A. Maas and A. Carius, 'PD15: Creating space for action: options for small island states to cope with global environmental change', Review commissioned as part of the UK Government's Foresight Project, Migration and Global Environmental Change, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1149-pd15-creating-space-for-action-small-island-states.pdf>.

¹²⁵⁰ S. Castles, 'Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?', *Working Papers* No. 1. International Migration Institute (IMI), University of Oxford, Oxford, 2006, p. 11; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', 2012 *International Journal of Population Research*, available at: <http://www.hindawi.com/journals/ijpr/2012/498158/cta/>, p. 1; R. Zapata-Barrero, R. Faúndez García and E. Sánchez Montijano, 'Temporary and Circular Labour Migration (TCLM) of Workers between Colombia and Spain. A Model to Consolidate', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 51.

¹²⁵¹ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change', A Policy Brief prepared for the Secretariat of the Swedish Commission on Climate Change and Development and the World Bank World Development Report 2010 Team, Melbourne, Department of Resource Management and Geography, University of Melbourne, 2009, p. 30-45.

the labour markets of EU countries could be filled by accommodating migration from environmentally-affected communities, such migration can also contribute to the socio-economic growth and adaptation of those communities. In order to replicate the TCLM programme in other EU Member States, it obviously needs to be adapted to national and local specificities. As the TCLM programme is a context-based migration model, the political, economic and institutional context of the host region is decisive for its successful implementation. In particular, the political will to support temporary labour migration with a focus on co-development is needed. Policy measures linking migration with development and adaptation are thus urgently needed. In most states, such a comprehensive policy strategy is still lacking for the moment. And finally, a solid legal framework allowing and promoting circular migration is indispensable.

B. Circular adaptive migration in the EU's legal and policy framework

In order to facilitate circular international migration as an adaptation strategy, it is first of all necessary to allow temporary and circular (labour) migration, also for lower skilled workers. In some countries, the issuance of residence and work permits for third-country nationals can only take place within certain economic sectors or within certain quota, or is limited to certain third countries. In the latter case, labour migration could be facilitated through migration agreements with countries of origin (*see further below in Section 3.2.*). As discussed above, the encouragement of the circularity of the migrant is another important aspect of national policy and legislation. Furthermore, efficient migration procedures, with reliable migration institutions, contribute to the success of any labour migration programme¹²⁵². In many countries, the complexity of the procedures for legal employment of temporary workers is one of the main obstacles for labour migration. Inefficient procedures even act as a stimulus for employing irregular migrants already residing in the country. Last but not least, the flexibility of national migration legislation is vital for seasonal labour migration. The agricultural sector for example is exposed to sudden changes in production, and therefore needs to be able to respond to changes in the demand for workers.

¹²⁵² N. Magri, 'Temporary Circular Labor Migration between Colombia and Spain: A Model for Consolidation and Replication', Mpp Masters Thesis, with Supervision of Melissa Siegel, Maastricht Graduate School of Governance, Maastricht University, 2008-2009, p. 79 J.J. Vergé Oms, 'Planned Migration', in *Temporary and Circular Labour Migration. Experiences, Challenges and Opportunities*, International Organization for Migration (IOM) and Unió de Pagesos, 2010, p. 13.

Most circular migration programmes are governed by bilateral migration agreements between countries of origin and destination, instead of through regional or global migration governance. However, such programmes often remain quite small, and are not evaluated systematically¹²⁵³. The question thus rises which role the EU could play in supporting adaptive migration through circular migration programmes on a more regional level. Article 79 TFEU provides the European Parliament and Council with sufficient grounds to take the necessary legislative measures in order to “develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows”¹²⁵⁴, including measures on the conditions of entry and residence¹²⁵⁵. Such measures could thus include measures to promote and facilitate circular adaptive migration towards its Member States, while leaving the duration and method of granting temporary residence permits at the discretion of those states.

The above mentioned legislative and non-legislative recommendations seek to maximise the merits of circular labour migration as an adaptation strategy, and minimise its costs. In order to facilitate international adaptive migration, it is necessary to remove some of its legal, social and financial barriers. Finally, circular migration schemes also require the necessary funding. The future will need to clarify whether such funding could be made available for adaptive circular migration in the UNFCCC Cancun Adaptation Framework. As mentioned above (*see Chapter IV, Section 2.4.2.2.*) such funding could help to lift financial barriers to adaptive migration for the most vulnerable communities. Such funding, for instance through the Green Climate Fund, should be allocated to places of destination as well as places of origin, so as to fully address the range of challenges posed by environment-induced population movements¹²⁵⁶. However, the funding mechanisms under the UNFCCC are rightly oriented towards developing countries, as they are most in need of financial assistance. European countries should not be made eligible for funding under the Cancun Adaptation Framework.

¹²⁵³ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p.184-185.

¹²⁵⁴ Article 79(1) TFEU.

¹²⁵⁵ Article 79(2)(a) TFEU.

¹²⁵⁶ F. Gemenne, ‘Climate-Induced Population Displacements in a 4° C+ World’, 369 *Phil. Trans. R. Soc.* 1934, 2011, p. 182-195.

3.1.3. Humanitarian admissions in other migration categories

As discussed above, labour migration can offer an interesting adaptation alternative for persons and communities affected by environmental changes, but it does certainly not provide the ideal solution. For many vulnerable affected persons, labour migration will not be an option to leave their degraded environment. It is therefore interesting to explore whether other migration categories might offer mobility perspectives for environment-induced migrants.

One of the core distinctions made in the study of migration law and policy, is the one between voluntary migration on the one hand and involuntary migration (or displacement) on the other hand, often referred to as (legal) migration vs. asylum. As Boeles *et al.* explain, this distinction mainly concerns the drivers of migration, with voluntary migrants leaving their country for reasons of work, study or family reunification, while displaced persons have no other option but to leave their country in order to survive. However, as shown in Chapter I, human mobility should rather be conceptualised on a sort of migration “continuum”, where the choice people have to leave their region of origin varies widely (*see above in Chapter I, Section 1.3.2.3.*). Furthermore, social scientists have shown that migrants often leave their country for multiple reasons, and are thus difficult to be fit into one single category¹²⁵⁷.

Despite this knowledge, the legal system of EU Member States is still characterised by a strict division between a migration and an asylum “branch”. Factors such as labour market shortages, demographic reasons, or exchange of students mainly lie at the basis of a country’s migration policy, while ‘humanitarian’ considerations form the basis of its asylum policy, for instance for Geneva Convention refugees, victims of war or severely ill persons. However, there is no reason why EU Member States could not take humanitarian considerations into account when establishing admission rules in their immigration policy. After all, also labour migrants, students or family members often do not leave their country purely voluntarily, as they might also be stimulated to migrate for compelling economic or humanitarian reasons¹²⁵⁸. Although European governments tend to support restrictive migration policies, some countries have already taken such measures, for instance by temporarily easing the

¹²⁵⁷ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis lII, Intersentia, Antwerp, 2009, p. 435-436.

¹²⁵⁸ P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law*. Ius Communitatis lII, Intersentia, Antwerp, 2009, p. 3.

conditions for family reunification for countries suffering from extreme humanitarian distress, such as in the Syria war in 2013-2014¹²⁵⁹.

As environmental factors will in the future increasingly become important triggers for migration, it can be recommended to incorporate those factors into the EU's admission policy, not only through complementary protection regimes for displaced persons, but also in the legislation on the immigration of third country nationals. Mirroring the less strict requirements for family reunification for family members of recognised refugees and persons being granted subsidiary protection, conditions for family reunification could also be eased for family members which are confronted with sudden natural hazards or severe slow-onset degradation. The same could be done with requirements for student visa. This way, the options for legal migration for environmentally-affected persons can be broadened, as part of a larger strategy to promote international migration as an adaptation strategy.

3.2. Migration agreements with environmentally-affected countries

3.2.1. In general: facilitating adaptive migration through migration cooperation with affected countries

As discussed in Chapter VI, the EU increasingly focuses its attention in the area of migration to cooperation with third countries, namely through the 'external dimension' of its migration policy (see *above in Chapter VI, Section 1.3.2.*). The question now rises whether international adaptive migration could be facilitated through the Union's external relations with countries affected by environmental degradation. In light of the above made recommendations regarding the immigration of third country nationals, it is thus worth to briefly touch upon the possibility to create new or adapted admission categories for environmentally-affected communities through migration agreements with countries affected by environmental degradation. As the European Commission already stated in its Staff Working Paper,

¹²⁵⁹ Since March 2014, Ireland offers for example temporary residency to vulnerable Syrians with close family members in Ireland. See further in the Weekly Bulletin of the European Council on Refugees and Exiles (ECRE) of 28 March 2014, available at: <http://www.ecre.org/component/downloads/downloads/871.html>.

“given the strong evidence that most migration which is primarily driven by environmental change is likely to occur within the Global South, much of the analysis of the paper and many of its recommendations are of specific relevance for EU policies with an external focus, including on development, foreign policy and humanitarian aid”¹²⁶⁰.

The tools used by the EU in its external relations regarding migration issues range from action plans and road maps to bilateral and regional agreements with third countries¹²⁶¹. Indeed, with the purpose of managing international migration, and fighting irregular migration, EU Member States increasingly conclude agreements with third countries. Aside from facilitating the return of irregular migrants, migration agreements often aim to simplify the selection of foreign workers, and establish the rights and obligations of migrants and their countries of origin and destination.

According to Somerville, the potential of the EU’s external relations in the context of migration and environmental change lies in the possibility to mainstream environment-induced migration into such specific agreements. However, he immediately acknowledges that the degree in which this will happen depends on external events and foreign policy considerations¹²⁶². As environment-induced migration is currently not (yet) a policy priority for the EU, it appears not to be likely that this will happen in the near future.

Nonetheless, in its April 2013 Staff Working Document, the European Commission itself highlighted that the potential of migration as an adaptation strategy could be brought under the attention of partner countries through political dialogues in the area of both migration and climate change adaptation. In this context, the Commission points to the Global Approach to Migration and Mobility, under which umbrella the EU is engaged in a range of bilateral and regional migration dialogues with developing countries. According to the Commission, “measures to facilitate migration as an adaptation strategy could therefore receive greater attention under GAMM [Global Approach to

¹²⁶⁰ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 3.

¹²⁶¹ W. Somerville, ‘PD17: Environmental migration governance: debate in the European Union’, review commissioned as part of the UK Government’s Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 12.

¹²⁶² W. Somerville, ‘PD17: Environmental migration governance: debate in the European Union’, review commissioned as part of the UK Government’s Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 12.

Migration and Mobility] dialogues with countries or regions which are particularly vulnerable to climate change”¹²⁶³.

This being said, the question rises which kind of migration agreement is most suited to incorporate such an environmental perspective. In the context of the discussion of the TCLM programme for Colombian workers, we have already seen that this migration scheme was supported by a bilateral agreement between Colombia and Spain, which was then transposed into Spanish migration legislation (*see above in Chapter II, Section 2.1.4.*). Certainly, such a bilateral agreement has the advantage of being most adapted to the specific contexts of the countries of origin and of destination. However, in the context of the externalisation of the EU’s migration policy, another kind of migration cooperation has now come to the fore.

3.2.2. EU Mobility Partnerships: a tool for coherent policymaking in the context of environment-induced migration?

Besides bilateral agreements, concluded at the national level, migration cooperation can also take place at the regional level. In 2001, the EU introduced the ‘EU Mobility Partnerships’, with the aim of identifying “novel approaches to improve the management of legal movement of people between the EU and third countries ready to make significant efforts to fight illegal migration”¹²⁶⁴. Mobility Partnerships are cooperation arrangements between a number of EU Member States and a third country, consisting of joint declarations negotiated between the Commission and the third country, based on political guidelines of the Council, aiming to provide a framework for dialogue and practical cooperation on a voluntary basis. Cooperation usually covers the main themes of legal migration, irregular migration, and the link between migration and development.

¹²⁶³ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 27-28.

¹²⁶⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘Circular Migration and Mobility Partnerships between the European Union and Third Countries’, COM(2007)248 final, Brussels, 16 May 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0248:FIN:EN:PDF>, p. 2; R. Parkes, ‘EU Mobility Partnerships: A Model of Policy Coordination?’, 11 *European Journal of Migration and Law* 4, 2009.

Pilot partnerships have been set up in 2008 with the Republic of Moldova and Cape Verde and in 2009 with Georgia. They were later followed by partnerships with Armenia in 2011 and Azerbaijan in 2013. With the Mobility Partnerships agreed upon with Morocco in June 2013 and Tunisia in March 2014, the first partnerships were entered into with countries bordering the Mediterranean. Important to note is that EU Mobility Partnerships only provide a non-legally binding framework, whereby some of its components will fall under the EU's competence, and others are to be decided upon by individual Member States¹²⁶⁵. Their legal nature is thus complex. However, the partnerships can also offer the necessary flexibility to respond to changing international migration trends.

The introduction of the EU Mobility Partnerships reflects the increasing association of Europe's migration policy with other policy areas. In this sense, the Mobility Partnerships could perhaps act as a framework for specific migration projects between EU Member States and affected third countries in the context of migration and environmental change. In a study ordered by the European Parliament, the Partnerships were already mentioned as a relevant instrument to address environment-induced migration, as they are able "to establish a structured dialogue on migration, mobility and security between the EU and third countries"¹²⁶⁶. So far, very few Member States have adopted legislation explicitly considering the environmental drivers of migration. The Section above on the facilitation of migration has discussed some possibilities to account for environment-induced population movements in European and national migration law and policy. EU Mobility Partnerships might act as a starting point for such innovative measures, as they provide the necessary framework for dialogue between the EU, its Member States and affected third countries.

Aside from providing assistance to third countries in increasing their resilience to environmental disasters, the Partnerships could provide migration opportunities to those which are most affected by environmental degradation. In exchange for measures reducing irregular migration, the EU or its Member States could enable vulnerable third country nationals to access their territories. Improved opportunities for circular migration could for instance be given as part of a larger strategy to assist developing countries in adapting to a changing climate. The report of Kraler *et al.* also highlights that

¹²⁶⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Circular Migration and Mobility Partnerships between the European Union and Third Countries', COM(2007)248 final, Brussels, 16 May 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0248:FIN:EN:PDF>, p. 3.

¹²⁶⁶ A. Kraler, T. Cernei and M. Noack, "'Climate Refugees": Legal and Policy Responses to Environmentally Induced Migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen's Rights and Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>, p. 68.

the resettlement of individuals from countries that have experienced environmental disasters should be considered by the EU (*see further below in Section 3.3.*)¹²⁶⁷. EU Mobility Partnerships could finally also be used to enhance the protection of environmentally displaced individuals outside the EU, for instance through assistance in strengthening the capacity of the partner country in dealing with internally-displaced persons related to environmental disruptions¹²⁶⁸.

Further research into the possibilities of EU Mobility Partnerships in the context of migration and environmental change is necessary. However, as Member States are generally reluctant to transfer competences on migration to the Union, it remains to be seen whether EU Mobility Partnerships can actually take up this innovative role in the future. In considering the role of Mobility Partnerships as a mechanism for governing circular migration schemes, some concerns have also been expressed as to the legal value of such partnerships¹²⁶⁹. It is clear that this legal uncertainty needs to be addressed in order for Mobility Partnerships to become efficient instruments to address environment-induced population movements.

3.3. Resettlement of environment-induced migrants and displaced persons

Within the context of environmental degradation and migration, not only voluntary and independent migration is recognised as a possible adaptive response, but also planned and organised resettlement is increasingly considered as a possible coping strategy to deal with disruptions of the natural

¹²⁶⁷ See further in A. Kraler, T. Cernei and M. Noack, *“Climate Refugees”: Legal and Policy Responses to Environmentally Induced Migration*, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at: [http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&](http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&file=60931&), p. 67-68.

¹²⁶⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, ‘Communication on migration’, COM(2011) 248 final, Brussels, 4 May 2011, available at: http://ec.europa.eu/home-affairs/news/intro/docs/1_EN_ACT_part1_v11.pdf, p. 16-17; A. Kraler, T. Cernei and M. Noack, *“Climate Refugees”: Legal and Policy Responses to Environmentally Induced Migration*, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at: [http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&](http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&file=60931&), p. 68.

¹²⁶⁹ See further in S. Carrera and R. Hernández i Sagrera, ‘The Externalisation of the EU’s Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?’, *CEPS Working Document* No. 321, October 2009.

environment¹²⁷⁰. Both migration and planned resettlement could reduce population pressure in regions with a fragile environment. For populations living in the worst affected areas, resettlement might even be the only possible solution for their survival¹²⁷¹. For instance for ‘trapped populations’, or for people without resources to adapt or to migrate, planned relocation can help them to leave their destructed environment, or prevent them from being displaced¹²⁷².

PART II of this study showed that resettlement or planned relocation is increasingly integrated into National Adaptation Programmes of Action (NAPAs), as a strategy to react to floods or sea level rise. An interesting example is the ‘Safer Island Strategy’ of the Maldives, a programme which resettles communities from vulnerable islands to safer and better protected islands¹²⁷³. Within the international academic and political debate on environment-induced migration, planned relocation has increasingly gained attention as a possible ‘durable’ solution for people and communities at risk from environmental disruptions. The 2011 Foresight Report for example has defined relocation as “the movement of people, typically in groups or whole communities, as part of a process led by the state or other organization, to a predefined location”¹²⁷⁴, while the Cancun agreements have listed planned relocation as one of the three types of human mobility among a range of possible adaptation actions (*see above in Chapter IV*)¹²⁷⁵.

¹²⁷⁰ S. Martin, ‘Climate Change, Migration and Governance’, 16 *Global Governance on Migration* 3, July-September 2010, p. 410-411; A. Kraler, T. Cernei and M. Noack, “‘Climate Refugees’: Legal and Policy Responses to Environmentally Induced Migration”, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at: [http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&](http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&file=60931&), p. 47-48.

¹²⁷¹ A. Kraler, T. Cernei and M. Noack, “‘Climate Refugees’: Legal and Policy Responses to Environmentally Induced Migration”, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at: [http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&](http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&file=60931&), p. 47.

¹²⁷² European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 31.

¹²⁷³ A. Kraler, T. Cernei and M. Noack, “‘Climate Refugees’: Legal and Policy Responses to Environmentally Induced Migration”, Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen’s Rights and Constitutional Affairs, Brussels, 2011, available at: [http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&](http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&file=60931&), p. 47.

¹²⁷⁴ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 234.

¹²⁷⁵ Paragraph 14(f) of the Cancun Agreements, AWG-LCA Outcome Decision.

Resettlement is defined by the UNHCR as out of three durable solutions for refugees, recognized as such by the 1951 Refugee Convention. According to the UNHCR's Resettlement Handbook, a resettlement process includes the selection and transfer of refugees from the country of refuge to a third country which has agreed to grant them a permanent residence status, protecting them against refoulement and providing them with access to rights similar to those enjoyed by nationals¹²⁷⁶. The UNHCR prefers to limit 'resettlement' to refugees as defined in the 1951 Refugee Convention, and chooses to use the term 'relocation' when it concerns persons displaced by conflicts or environmental disasters¹²⁷⁷. For the aim of this Section, the term 'resettlement' will be used as an overarching term to describe the planned and organised, primary or secondary movement of populations or individuals to chosen areas.

Resettlement in the context of environment-induced population movements can take different forms. Firstly, government-led resettlement can be chosen as an adaptation strategy when a whole population needs to be moved out of an area affected by or at risk of severe environmental disruption. In this meaning, 'planned relocation' was recognised as one of the types of environment-induced mobility in paragraph 14(f) of the Cancun Agreements. Resettlement of environmentally-affected communities might also be a tool in the context of ecological restoration. In some cases, whole communities will need to be moved in order to allow the environment to be restored. In other cases, communities can be relocated towards their restored region of origin, after the completion of successful ecological restoration projects. Furthermore, environmentally-displaced persons often seek refuge to areas also under environmental, political or social threats, or remain in protracted displacement situations in large refugee camps. They might thus be in need of resettlement to safer areas in another region within their country, or even to another country. This is the case when the host community lacks the capacity to provide the displaced with a durable solution in their first place of refuge.

Resettlement can thus be a form of primary movement, *i.e.* from the affected region to a safer area, or a form of secondary movement, when displaced persons are relocated from their place of refuge towards another region within their country or to a 'third country'. Displaced persons can also be relocated to their region of origin, if the environment allows them to re-establish themselves there.

¹²⁷⁶ United Nations High Commissioner for Refugees (UNHCR), UNHCR Resettlement Handbook, Division of International Protection, Geneva, July 2011, available at: <http://www.unhcr.org/4a2ccf4c6.html>, p. 9.

¹²⁷⁷ A. Kraler, T. Cernei and M. Noack, "'Climate Refugees': Legal and Policy Responses to Environmentally Induced Migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen's Rights and Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>, p. 60.

Resettlement can furthermore take place within the country of origin (internal resettlement), or across international borders (external resettlement). In this Section, the focus lies on external resettlement, where we particularly concentrate on the resettlement of environmentally-affected and -displaced persons from outside EU territory to EU Member States.

In the EU, a Joint EU Resettlement Programme was established in the context of the development of a Common European Asylum System (CEAS)¹²⁷⁸. As several EU Member States already participated in resettlement on an annual or on an *ad hoc* basis, the aim was to better coordinate these resettlement programmes at the regional level, and to more strategically integrate them into EU external policy actions. The objective is to provide refugees with a secure access to protection on the EU territory, thereby also expressing solidarity towards third countries. The joint EU action furthermore aimed to encourage more Member States to be involved in resettlement action, for instance through a financial incentive for Member States to participate, based on jointly defined key priorities¹²⁷⁹.

Important for the topic of this study, is the fact that the Commission proposes an adaptable mechanism, which is suited to respond to evolving needs. Resettlement priorities should thus be revised annually, in order to be adapted to changing circumstances¹²⁸⁰. Furthermore, under current European resettlement programmes, the displaced persons eligible for participation are generally the most vulnerable persons in a protracted displacement situation, such as children, single mothers or persons in need of medical treatment. While there are currently no European resettlement projects for people affected or displaced by environmental disruptions, it could be an interesting policy option for the future. According to Kraler *et al.*, environmentally-displaced persons could be part of priority groups in case natural disasters have caused mass displacement situations, or for situations where displacement is aggravated by slower-onset environmental degradation, such as in the case of severe droughts in East Africa¹²⁸¹. As such, resettlement could be considered as a sort of burden-sharing

¹²⁷⁸ European Commission, Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM(2009) 456 final, Brussels, 2 September 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0447:FIN:EN:PDF>.

¹²⁷⁹ European Commission, Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM(2009) 456 final, Brussels, 2 September 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0447:FIN:EN:PDF>, p. 5-6.

¹²⁸⁰ European Commission, Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM(2009) 456 final, Brussels, 2 September 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0447:FIN:EN:PDF>, p. 7.

¹²⁸¹ A. Kraler, T. Cernei and M. Noack, "'Climate Refugees': Legal and Policy Responses to Environmentally Induced Migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen's Rights and Constitutional Affairs, Brussels, 2011, available at:

mechanism between the developed countries and the countries mostly affected by environmental degradation processes.

While the discussion on the resettlement of environment-induced migrants is almost non-existent at the EU policy level, there have been some relevant legal and policy developments at the national level, which are interesting because they may act as good practices on how to deal with resettlement in the context of environment-induced population movements¹²⁸². One interesting example of policy development in the United Kingdom (UK) is the country's reaction to the volcanic eruptions in Montserrat, a British overseas territory, in the 1990s. The volcanic eruptions of 1995 and 1997 rendered a major part of the island uninhabitable, leading to the emigration of a large part of the population, including about 5.000 people to the UK. In 1995, the UK government installed a voluntary evacuation scheme, which granted Montserratians exceptional leave to remain in the UK for 2 years, including entitlements to housing, benefits, employment, health care and education. In 1997, the programme was complemented with an Assisted Passages Programme, with the aim of providing financial assistance to Montserratians to relocate to the UK. From 1998, candidates could apply for permanent residence, and in 2002, they were finally permitted to apply for full British citizenship¹²⁸³.

The case of Montserrat seems like a *de facto* example of resettling affected persons in the aftermath of a natural disaster. However, as Somerville rightly points out, it is an atypical case, as Montserrat was a British overseas territory, which made it politically acceptable to resettle affected Montserratians. Therefore it is unlikely to become a precedent for the resettlement of whole communities affected by natural disasters to EU countries¹²⁸⁴. Nonetheless, similar to the *ad hoc* asylum mechanisms for victims of natural disasters discussed in Chapter III, the Montserrat case indicates the presence of a political will to resettle persons displaced by sudden-onset natural disasters in some specific well-defined cases. States prefer such *ad hoc* mechanisms, instead of a proactive set-up of resettlement programmes for victims of natural disasters. However, considering

<http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>, p. 62.

¹²⁸² W. Somerville, 'PD17: Environmental migration governance: debate in the European Union', review commissioned as part of the UK Government's Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 8.

¹²⁸³ W. Somerville, 'PD17: Environmental migration governance: debate in the European Union', review commissioned as part of the UK Government's Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 9.

¹²⁸⁴ W. Somerville, 'PD17: Environmental migration governance: debate in the European Union', review commissioned as part of the UK Government's Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 9.

that EU Member States do organise resettlement programmes for refugees on a yearly basis, which only a couple of years ago seemed politically unachievable, there seems to be no reason why they would not do the same for victims of natural disasters. Moreover, Chapter I of this thesis showed that people displaced due to sudden-onset environmental disasters are, unlike refugees recognised by the 1951 Refugee Convention, mostly in need of a temporary shelter, and could return to their region of origin once the area has recovered and been rebuilt.

In its 2013 Staff Working Document, the Commission argues that the EU should consider supporting countries affected by environmental disruptions to set-up “preventive internal, or where necessary, international relocation measures when adaptation strategies can no longer be implemented”¹²⁸⁵. To this end, it suggests to organise consultations at the national, regional and international policy level, whereby the EU and its Member States could share their experiences in supporting and implementing their own resettlement programmes. Obviously, it is valuable that the EU would support non-EU countries in the management of internal or inter-regional relocation programmes. However, it is also regrettable that the Commission only sees a supporting role for the EU, and does not mention that the EU itself could also relocate environmentally-affected persons through its own resettlement programmes. This way, the EU could not only play a supporting role, but instead become a main actor in setting an example for other developed countries. It could thus be recommended that the EU takes the environmental drivers of migration into account in the further development of its Joint EU Resettlement Programme.

3.4. Assisted return migration for environment-induced migrants and displaced persons

The current EU migration policy is characterised by a strong emphasis on return, as shown for instances by the rise of re-admission agreements with third countries as part of the international and trade policy. Historically, return migration to the country of origin is seen as one out of three durable solutions to protracted refugee and displacement crises, next to resettlement to a third country and

¹²⁸⁵ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 31.

local integration in the country of stay¹²⁸⁶. In light of the mobility challenges posed by a changing and increasingly degrading environment, it is interesting to discuss whether or not return migration can be considered a possible durable solution for environment-induced migrants and displaced persons¹²⁸⁷.

Before getting more into detail, this Section first conceptualises return migration within the general migration debate (3.4.1). The right to freedom of movement then provides the starting point for the further analysis, including the right for any person to leave a country, as well as the right to return to his or her own country (3.4.2). While it is often advocated that people living in a degrading environment should have a “right to leave” and a “right to stay”¹²⁸⁸, these assumptions surely deserve more legal academic attention, discussing how we could guarantee these rights in a warming and deteriorating world. Arguing that return migration can only be a *durable* solution if it contributes to the socio-economic re-establishment of the returnee in his country of origin, Section 3.4.3. then analyses if and how return migration could in practice act as a durable development and adaptation strategy for environment-induced migrants and their communities of origin.

3.4.1. Conceptualisation of return migration

Worldwide, many migrants cherish the hope to be able to return to their place of origin. In particular for those which were forced to leave their original habitat, a safe and dignified return is considered as a ‘durable solution’ and a way to relieve some of the harm imposed by the displacement¹²⁸⁹. But also in case legal procedures in the destination country do not lead to a residence permit, there is often no other choice than to return to the country of origin.

¹²⁸⁶ According to the UNHCR, voluntary repatriation is one out of 3 durable solutions (next to local integration in the country of asylum and resettlement in a third country), that should allow refugees to rebuild their life in dignity. See further at <http://www.unhcr.org/pages/49c3646cf8.html>.

¹²⁸⁷ M. Bradley and J. McAdam, ‘Rethinking Durable Solutions to Displacement in the Context of Climate Change’, Paper for the Brookings-LSE Project on Internal Displacement of 14 May 2012, available at: <http://www.brookings.edu/research/papers/2012/05/14-displacement-bradley-mcadam>, p. 2-3.

¹²⁸⁸ F. Gemenne, ‘Climate-induced displacements in a 4°C+ world: scenarios and policy options’, IDDRI Sciences Po, Presentation at the Nansen Conference, Oslo, 6 June 2011; F. Gemenne, ‘Migration, Security and Human Development in the Face of Climate Change’, IDDRI Sciences Po, Presentation for the ‘Jornada Vint Anys després Rio’ in Barcelona, 29 February 2012.

¹²⁸⁹ M. Bradley and J. McAdam, ‘Rethinking Durable Solutions to Displacement in the Context of Climate Change’, Paper for the Brookings-LSE Project on Internal Displacement of 14 May 2012, available at: <http://www.brookings.edu/research/papers/2012/05/14-displacement-bradley-mcadam>, p. 2.

According to the IOM, return migration is a “relatively new area of migration”, without standard meaning in migration policy or law¹²⁹⁰. Obviously, a comprehensive and effective asylum and migration policy cannot go without a humane and durable return policy. However, considering its complex and sensitive nature, return is an emotionally charged topic. Nonetheless, the past few years, return migration has come to the forefront. In particular assisted voluntary return (AVR) is increasingly recognised as a valuable alternative in the migration process, as it helps migrants to return to their home countries when they do not have the means to do so. AVR programmes would thus represent a humane alternative to forced removals, and could even contribute to the socio-economic development of the regions of origin (*see further below in 3.4.4.2.*).

Even though return migration can take different forms, the general migration debate uses a rather limited terminology, referring only to forced or voluntary return. This wrongly gives the impression that there are only two return modalities. Furthermore, the policy debate generally focuses on the return of irregular migrants, while it are also migrants with a legal residence status who choose to return to their country of origin. In that sense it is better only to speak of 'voluntary return' when the decision to return is taken by foreigners who have a right to stay in their country of destination (*e.g.* asylum seekers awaiting a decision on their asylum application, as well as other migrants with a temporary or permanent residence permit). After all, a return is not "voluntary" if it is only a reaction to an order to leave the territory, in which case it is better to use the term “mandatory return”. Migrants who receive an order to leave the territory can do so independently, with their own means, or they can make use of organised, assisted return programmes. If they refuse to leave, they can be forcibly removed from the territory.

In many countries, irregular migrants are encouraged to obey to a removal order, both through return and reintegration programmes, as well as by the prospect of a forced removal. Projects that support the return and reintegration of rejected asylum seekers or other irregular migrants undeniably have an added value compared to forced removals, both for the individual concerned and for the country of residence, but they should leave the discourse of "voluntariness"¹²⁹¹.

¹²⁹⁰ Webpage of the International Organisation on Migration (IOM) on 'return migration', available at: <http://www.iom.int/jahia/Jahia/about-migration/managing-migration/managing-migration-return-migration/lang/en>.

¹²⁹¹ International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 21.

	Voluntary return	Mandatory return
<i>Who?</i>	Migrants who legally reside in the country of destination	Migrants who do not have the right to remain in the country of residence, thus being obliged to leave the territory.
<i>Return modalities</i>	→ Independent return → Assisted return	→ Independent return → Assisted return → Forced return

The table above reflects better how migrants perceive their return. When they leave their country of stay after a removal order, they do not sense their return as “voluntary”, as they only choose to return to avoid a forced removal or irregular stay. Voluntary return only exists when migrants make an informed and conscious choice between returning to their country of origin or integrating in the country of stay. The “obedient” return of people who are not allowed to stay in their country of destination is not a voluntary return, but can be supported by assisted return and reintegration programmes, in order to help them to rebuild a dignified existence in their home country.

3.4.2 The right to return and to leave in international law

The right to freedom of movement, as incorporated in the Universal Declaration of Human Rights of 1948¹²⁹² and the International Covenant on Civil and Political Rights (ICCPR) of 1966¹²⁹³, seems crucial

¹²⁹² Article 13 of the Universal Declaration of Human Rights, adopted through Resolution 217A of the UN General Assembly of 10 December 1948, declares that:

“(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.”

¹²⁹³ Article 12 of the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171, holds that:

“(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
(2) Everyone shall be free to leave any country, including his own.
(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

for a discussion on return migration. According to Article 12 ICCPR, this right includes the right for any person to leave any country, as well as the right to enter, or to return to, his or her own country. The question now rises how we could guarantee these rights in a warmer and deteriorating world, where more and more regions of origin become uninhabitable. In other words, what are States' obligations in relation to the right to leave, and the right to return?

The right to enter one's own country implies the right to remain in one's own country, as well as the right to return to his own country¹²⁹⁴. As for the latter, this implies that states are obliged to take their citizens back in. However, it is generally accepted that the right to return entails only a passive duty for states to allow their citizens back in, and not the active duty, nor for the country of origin, nor for the country of stay, to facilitate or support the return for migrants who do not have their own means to do so. Moreover, it is not stipulated that the return must be a "sustainable" return, whereby the returnee has a perspective in his country of origin. However, a state may not hinder the return, for example by making it difficult or impossible to obtain the necessary travel documents. Finally, the counterpart of the right to return is the right to leave any country, including his own. This means that also the country of stay may not put obstacles in the way of migrants to leave the territory, and return to their country or origin¹²⁹⁵.

3.4.3. Return migration in the context of environment-induced mobility

Even though states are not legally obliged to support the return and reintegration of environment-induced migrants and displaced persons, it is relevant to discuss whether such a policy approach would be recommendable. Just as for any other category of international migrants or displaced persons, a return to the country of origin might be a desire for people which left their original habitat due to environmental disruptions. For regions which are not rendered uninhabitable, or where human life is (again) possible after a period of recovery or ecological restoration, the question rises

(4) No one shall be arbitrarily deprived of the right to enter his own country".

¹²⁹⁴ United Nations Human Rights Committee (UNHRC), General Comment No. 27 on the Freedom of Movement (art. 12), adopted on 18 October 1999 at its 1783rd meeting (sixty-seventh session), UN Doc. CCPR/C/21/Rev.1/Add.9, §19.

¹²⁹⁵ United Nations Human Rights Committee (UNHRC), General Comment No. 27 on the Freedom of Movement (art. 12), adopted on 18 October 1999 at its 1783rd meeting (sixty-seventh session), UN Doc. CCPR/C/21/Rev.1/Add.9, § 9.

whether policymakers should aim to facilitate a safe and durable return and reintegration in the community of origin¹²⁹⁶.

3.4.3.1. Return migration as a development and adaptation strategy

Obviously, return migration can only be successful when the returnee has sufficient perspectives in his country of origin. When for example large groups of refugees return to their region of origin after an armed conflict took place, their return should be accompanied by measures supporting the recovery and reconciliation within the region. Measures that contribute to the reconstruction of the home region or the socio-economic development of the home community enlarge the sustainability of the return process¹²⁹⁷. The same holds true for regions affected by severe sudden-onset natural disasters, where return programmes should contribute to the reconstruction of the affected area in order to be successful. Similarly, return migration could be opportune for communities affected by gradual environmental degradation, under the condition that the return process contributes for example to the socio-economic development of the home community. According to Afifi, return migration can even contribute to the ecological restoration of the region of origin. As discussed above in Chapter I, the natural environment in Niger for example suffers from droughts, soil degradation, sand intrusion and the shrinking of Lake Chad, which all together had an impact on migration at the national and international level. Working age males who used to migrate seasonally to coastal cities within the country, left to further destinations in and outside the country, and are often not able to return to their home region. As the women, children and elderly who stayed behind, lacked sufficient physical support to restore the environment, the government started a programme, offering financial support to encourage young men to return to their region of origin, and to take part in the ecological restoration of the environment¹²⁹⁸ (*see above in Chapter I, Section 1.3.2.2.*).

Returned migrants often have acquired new knowledge and skills in their former country of residence, allowing them to diversify their income upon return to their country of origin. However,

¹²⁹⁶ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 256.

¹²⁹⁷ European Commission, 'Green Paper on a Community Return Policy on Illegal Residents', Brussels, 10 April 2002, COM(2002) 175 final, p. 23-24.

¹²⁹⁸ T. Afifi, 'Economic or Environmental Migration? The Push Factors in Niger', 49 *International Migration* e95, Special Issue on Environmentally Induced Migration in the Context of Social Vulnerability, 2011, p. e95-e124.

although it is generally accepted that the reintegration of migrants has development benefits, the policy in many countries is not equipped to bring this knowledge, skills and/or financial means into action for the socio-economic development of the region of origin. Fortunately, there is now a tendency to actively link return policies to development needs in countries of origin¹²⁹⁹. More and more specific reintegration projects are created for small entrepreneurs, which could provide opportunities for employment in the region of origin. Various organisations provide assistance to returnees to concretize their business plans, and provide them with business trainings or financial assistance to realize their dreams as entrepreneurs. This way, assisted return offers a valuable and dignified perspective for the returnee's future as well as for his community of origin.

The last decennia brought about a myriad of initiatives supporting the return of migrants to their country of origin. However, besides better guidance, assistance and supervision, it is also necessary to remove some of the obstacles that might hinder migrants to return to their country of origin. By facilitating circular migration between countries of origin and former countries of residence, for example through flexible access conditions or multiple entry-visas, migrants could be encouraged to re-migrate to their country or origin. Furthermore, bilateral or multilateral agreements on the portability of social security rights could ensure that returnees do not lose their accrued rights¹³⁰⁰. Moreover, it is important to provide rejected asylum seekers or other irregular migrants with a longer period to fulfil a removal order, before a state can proceed to a forced removal. This way, migrants have a better chance to prepare their return properly, with or without the help of a support programme. Finally, international agreements could provide the necessary framework to support the link between return, reintegration, development and adaptation to changing environmental conditions.

¹²⁹⁹ Global Forum on Migration and Development (GFMD), 'Background Paper to Roundtable 2: Migrant integration, reintegration and circulation for development' (Session 2.2.: Reintegration and circular migration – effective for development?), prepared by the Governments of Brazil and Portugal in collaboration with the RT team, the RT coordinator Dr. Irena Omelaniuk and the Task force set up by the Greek government for the preparation of the third meeting of the GFMD in Athens, 2009.

¹³⁰⁰ Global Forum on Migration and Development (GFMD), 'Background Paper to Roundtable 2: Migrant integration, reintegration and circulation for development' (Session 2.2.: Reintegration and circular migration – effective for development?), prepared by the Governments of Brazil and Portugal in collaboration with the RT team, the RT coordinator Dr. Irena Omelaniuk and the Task force set up by the Greek government for the preparation of the third meeting of the GFMD in Athens, 2009.

3.4.3.2. The tool of assisted return migration

Even though states are not obliged to assist migrants to return to their home country in a safe, dignified and durable manner, assisted return has gained significant weight in the general debate on return migration, both at the national, regional as well as the international policy level. Not only do assisted return programmes aid migrants to return to their countries of origin in a more humane and dignified way than forced removals, they are also more cost-effective for the country of stay, they ensure that migrants have more time to prepare for their return, and make it possible for migrants to return when they do not have their own means to do so¹³⁰¹.

In general, assisted return programmes provide administrative, logistical as well as financial support to migrants unable or unwilling to stay in the country of residence. They do not only facilitate the actual return of migrants, for example by making travel arrangements and facilitating the provision of travel documentation, but also aim to assist migrants to cope with the challenges they face prior to and after their return. Pre-return assistance can for example include the provision of information and advice to migrants on their available options, so as to help them to decide on whether or not they wish to return. Often, assisted return programmes focus particularly on vulnerable groups, such as migrants with health-related needs or other highly vulnerable migrants¹³⁰².

In order to guarantee a dignified and sustainable return, not only the return itself but also the reintegration of the returnees must be supported. A returnee will indeed re-migrate if he sees no future in his country of origin. In order to help returnees to be reinserted into their communities of origin, the provision of reintegration assistance has increasingly gained attention, and has now become an integral part of many assisted return programmes. Assistance is provided in the form of short- or longer-term accommodation after arrival in the region of origin, or through medical support. Furthermore, the sustainability of the return process becomes more important in policy formulation, acknowledging the fact that the root causes of migration must be addressed in order for the return to be durable and sustainable¹³⁰³. Among other things, it is for example crucial to provide

¹³⁰¹ International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 21.

¹³⁰² International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 17.

¹³⁰³ International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 25.

the necessary tools for migrants to be self-sufficient upon return to their country of origin. Reintegration assistance can thus include assistance with job placement, the set-up of small businesses, education and training¹³⁰⁴.

Reintegration assistance not only benefits the individual returnee, but can also enhance the socio-economic development of the wider community of origin. In order to guarantee a greater sustainability of an individual's return, it is important to address the socio-economic needs of the community of origin, thereby addressing the root causes of the original migration. Moreover, reintegration assistance could prevent potential disadvantages of the return process for the community of origin, such as the shortage of labour or the loss of remittances¹³⁰⁵. Return and reintegration assistance might thus have a triple-win effect, benefiting the migrants themselves as well as the country of residence and the community of origin.

In the EU, programmes of assisted return migration have generally been established on a national and on an *ad hoc* basis. It are mostly NGO's working at the national level, in cooperation with local NGO's working in the countries of origin, which are responsible for the provision of return and reintegration assistance, thereby often supported by the IOM. At this moment, the role of the EU is mostly to provide funds for such projects, for instance through the Commission's EuropeAid, or through the European Return Fund. The latter was established in 2007 with the aim of improving the EU's integrated return management in all its dimensions as well as encouraging the development of cooperation between EU countries and with countries of return. To this end, the Fund contributes to the financing of technical assistance on the initiative of Member States or the Commission¹³⁰⁶. Such an integrated return management in particular includes the support of effective and sustainable returns through return assistance, including in the pre-return phase, and incentives for voluntary returnees, as well as the provision of reception and reintegration support¹³⁰⁷. In this context, the European Migration Fund has already provided support for return and reintegration programmes, as well as for a better provision of information on such programmes to possible returnees. Activities co-

¹³⁰⁴ International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 20-24.

¹³⁰⁵ International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 19, 25.

¹³⁰⁶ Article 2, European Parliament and the Council, Decision No. 575/2007/EC of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', *Official Journal* L 144/45 of 6 June 2007.

¹³⁰⁷ Article 3(3), European Parliament and the Council, Decision No. 575/2007/EC of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', *Official Journal* L 144/45 of 6 June 2007.

financed by the Fund include for instance the establishment of return and reintegration programmes for vulnerable groups of persons, such as ill or disabled migrants, unaccompanied minors or the elderly.

As the 2008 Return Directive has adopted the principle of the preference for voluntary return in the EU's return policy¹³⁰⁸, it is to be expected that the EU might take up a larger role in the support of return and reintegration assistance than it has done so up till now. In light of the underlying study subject, it is therefore interesting to examine whether such programmes of assisted return migration are relevant in the context of environment-induced mobility.

3.4.3.3. Assisted return migration and environment-induced mobility

The question rises whether assisted return and reintegration programmes could also benefit the sustainable return of migrants who left their region of origin due to environmental disruptions, or who wish or need to return to a region which suffers from environmental degradation processes. As discussed above, all migrants have a right to return to their country of origin. However, in reality, even if people are allowed to return to their region of origin after an environmental disaster has occurred, their return can only be safe and durable if the physical, social and economic recovery of the affected area is rapid and effective. In the immediate aftermath of sudden-onset natural disasters, for example the diversification of livelihood provision and the reconstruction of infrastructure are crucial factors for the sustainability of a return, whether it is mandatory or voluntary¹³⁰⁹. According to Warner, even in case of slow-onset environmental processes, affected persons could under certain conditions return to their home region, given that the physical land is still available, particularly if alternative livelihoods or other coping capacities are present¹³¹⁰.

As discussed above, assisted return and reintegration programmes could render the return process more humane, dignified and sustainable. In the context of environment-induced migration, they should for example make financial means available for the recovery and rehabilitation in the post-

¹³⁰⁸ European Parliament and the Council, Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal* L 348/98 of 24 December 2008 (Return Directive).

¹³⁰⁹ K. Warner, 'Assessing Institutional and Governance Needs Related to Environmental Change and Human Migration', The German Marshall Fund of the United States, Study Team on Climate-Induced Migration, June 2010, available at: <http://www.ehs.unu.edu/file/get/5301>, p. 3.

¹³¹⁰ K. Warner 'European (im)migration policy and environmental change: institutional and governance gaps', 9 *European View* 2, 2010, p. 194.

disaster phase. Furthermore, return assistance could help environmentally-vulnerable communities to adapt to a changing environment by helping returnees to diversify their income. In addition, it is important not only to address the socio-economic root causes of migration, but also the potential environmental push factors, through mitigation and adaptation assistance. In order to decrease a community's vulnerability to recurring natural disasters, return assistance could also be directed towards resilience building and disaster risk reduction. Finally, as return migration could even contribute to the ecological restoration of certain regions of origin, assistance could be directed towards the creation of jobs in ecological restoration.

As the number of environmental disasters, and thus the number of environmentally-displaced persons, is expected to increase in the future, humanitarian organisations assisting in the return process could face a capacity challenge in the future. It is therefore important that they start preparing now, if they want to be able to assist many more millions of displaced persons in returning to their region of origin in a safe and durable manner. In 2011, the IOM, which is mandated by its Constitution to ensure orderly migration, *inter alia*, through voluntary return and reintegration assistance, has, with the help of its partners, provided 55.124 migrants with return assistance, in 166 countries of origin. About half of these migrants also received reintegration assistance to help them to reintegrate in their communities or origin¹³¹¹. Given the Organisation's crucial position regarding assisted return and its interest in the 'environment and migration'-debate, the IOM seems to be in an ideal position to start up the dialogue on assisted return towards regions affected by environmental degradation, taking the adaptation challenges and needs for ecological restoration into account. In light of this process, it can be recommended to install pilot projects for the assisted return of environment-induced migrants and displaced persons. As such projects with an environmental aspect are currently not (yet) in place, lessons can be learned from good practices of other IOM-supported return projects, assisting displaced persons to return to conflict-affected areas, and supporting them in the reconstruction of the affected regions. In this context, the EU could play an important role in the funding of return and reintegration assistance for environment-induced migrants, as well as through the promotion of a better cooperation in this area between its Member States and the affected countries of origin.

¹³¹¹ International Organisation for Migration (IOM), 'Assisted Voluntary Return and Reintegration, Annual Report of Activities 2011', IOM Report 2012, Geneva, available at: http://www.emnbelgium.be/sites/default/files/publications/avrr_report_2011_final.pdf, p. 13-15, p. 23.

4. WAY FORWARD

The emergence of climate-induced mobility into the international climate regime (*see above in Chapter IV*) should now encourage national, regional and international policymakers to act. Policies which explicitly recognise and support the value of international migration as an adaptive strategy are needed in order to implement paragraph 14(f) of the Cancun Adaptation Framework. This Chapter aimed to examine some legal and policy tools of the EU related to migration issues, highlighting that some of these tools and policy developments could be deployed to facilitate international adaptive migration. Indeed, the Commission's Staff Working Document indicated that the EU is starting to take the issue more seriously. As the Commission itself puts, "migration in the context of environmental change will present both major challenges and opportunities"¹³¹².

In order to comprehensively and efficiently address environment-induced population movements, the EU as well as its Member States will have to think out of the box of traditional policymaking in the area of asylum and migration. New governance approaches are needed to bridge the protection gap for environmentally-displaced persons, and to make migration work for adaptation¹³¹³. A range of tools developed under the Global Approach to Migration and Mobility could be used to address the issue of environment-induced migration. In this context, the Commission itself points to the better management of south-south migration and regional mobility, as well as to actions related to the migration-development nexus, such as the facilitation of remittance transfers¹³¹⁴. Indeed, such measures are important to support and promote migration as an adaptation strategy. However, measures facilitating international adaptive migration should not be limited to the context of development aid and south-south migration. The EU could also do pioneering work by incorporating the concept of international adaptive migration in its policies on the immigration of third country nationals. So in light of its Global Approach, the Union could then both assist third countries to deal

¹³¹² European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 34.

¹³¹³ K. Warner 'European (im)migration policy and environmental change: institutional and governance gaps', 9 *European View* 2, 2010, p. 202.

¹³¹⁴ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'An EU Strategy on adaptation to climate change'*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 35.

with environment-induced migration, and at the same time facilitate adaptive migration towards the Union, thereby addressing both the management of legal migration and its development benefits¹³¹⁵.

In developing novel legal and policy responses to broaden the migration options for communities affected by environmental disruptions, one possible option would be to develop specific labour migration programmes for environmentally-vulnerable communities. Other options that were discussed above include the support of circular migration, or increased migration opportunities for vulnerable family members of migrants already residing on EU territory. Such humanitarian admissions could for example be coupled to EU emergency responses in the aftermath of particular natural disasters¹³¹⁶. This would mean that, instead of taking a restrictive approach towards migration and regarding migration as a failure of adaptation to environmental changes, European policymakers should proactively support and facilitate international migration as an adaptation and development strategy by broadening migration options towards the EU. In doing so, policy responses should focus on maximising the benefits of migration, and minimising the costs for all the stakeholders involved in the migration experience.

For many migrants, a return to the country of origin remains an ideal which is often difficult to achieve due to a lack of sufficient resources or a lack of sustainable perspectives in the region of origin. Supporting the safe and dignified return of environment-induced migrants and encouraging their sustainable reintegration in their region of origin, is yet another way for the EU to come to a comprehensive, effective, sustainable and mutually beneficial approach to return migration in the context of environment change. And as it is necessary to address the root causes of migration in the process of return migration, environmental push factors should not be ignored. Assisted return and reintegration projects could for instance address adaptation needs in the region of origin, or direct assistance towards resilience building and disaster risk reduction.

Aside from a return to the country of origin, another durable solution to deal with displacement situations is offered by resettlement to a safe third country. In its Staff Working Document, the

¹³¹⁵ A. Kraler, T. Cernei and M. Noack, "'Climate Refugees': Legal and Policy Responses to Environmentally Induced Migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen's Rights and Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>, p. 75.

¹³¹⁶ A. Kraler, T. Cernei and M. Noack, "'Climate Refugees': Legal and Policy Responses to Environmentally Induced Migration', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Directorate-General for Internal Policies, Policy Department C on Citizen's Rights and Constitutional Affairs, Brussels, 2011, available at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60931&>, p. 70.

Commission proposed that the EU could, in the context of its Global Approach to Migration and Mobility, adopt “measures to provide assistance and durable solutions to displaced persons”¹³¹⁷. By resettling vulnerable displaced persons in the aftermath of sudden-onset natural disasters or persons which can no longer survive in a completely degraded region of origin, the EU could indeed contribute to find such durable solutions.

An important tool to realise these innovative legal and policy responses, is cooperation with third countries. As the Commission proposes, the issue of environment-induced migration should more frequently be brought “on the agenda of EU dialogue with the partner countries affected or likely to be affected, including under the Global Approach to Migration and Mobility”¹³¹⁸. The EU could indeed become a pioneer in facilitating adaptive migration, by specifically targeting bilaterally or regionally negotiated migration programmes towards disaster-affected and vulnerable communities in the partner country. Migration agreements with affected countries could thus increase the options for international adaptive migration, for instance through labour migration, broadened family reunification or resettlement projects. Furthermore, through cooperation with third countries, the Union could also integrate the concept of migration as an adaptation strategy into broader environmental policies, for instance by supporting third countries to adopt a migration perspective into their national adaptation planning¹³¹⁹.

However, Cournil *et al.* doubt whether the instruments introduced through the Global Approach to Migration and Mobility are suited to respond to the needs of environment-induced migrants. In particular the usage of circular migration for skilled and seasonal workers in response to climate-induced vulnerability has received some criticism, as it would signify a “shift from a broader, more “rights-based” approach, towards a narrower “money-based” migration”¹³²⁰. Indeed, it is crucial that

¹³¹⁷ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 35.

¹³¹⁸ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 35.

¹³¹⁹ European Commission, Commission Staff Working Document on ‘Climate change, environmental degradation, and migration’, accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on ‘An EU Strategy on adaptation to climate change’*, SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 28.

¹³²⁰ C. Cournil et al., ‘Human Rights and Climate Change : EU Policy Options’, Study requested by the European Parliament’s Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available

concerns on the rights of migrant workers must be addressed in order for migration to effectively work as a development and adaptation strategy.

Much of the above proposed policy measures and developments will depend on external events and political developments in the EU. However, as Somerville rightly poses, “the application of ‘hard’ tools, such as EU Directives, to environmental migration is very unlikely, whereas ‘soft’ tools can be considered likely, but with a corresponding lowering of expectations regarding how much policy development will take place”¹³²¹. It might thus currently seem more relevant to argue for the incorporation of the issue of environment-induced migration into the EU’s Global Approach to Migration and Mobility and the EU Mobility Partnerships, rather than to argue for the granting of legal protection under the EU Qualification Directive or the EU Temporary Protection Directive. Just as has been argued above in the context of the legal protection of displaced persons (*see above in Chapter III, Section 3.2.*) or the incorporation of migration into environmental law (*see above in Chapter IV, Section 2.3.1.*), such a soft law approach might then in the end lead to hard law obligations on the issue.

It can thus be concluded that the EU currently already has some interesting tools to address some of the challenges posed by environment-induced human mobility, and to facilitate international adaptive migration. It all comes down now to the political courage which is necessary to use these tools in the context of migration and environmental change and to implement measures to promote international migration as an adaptation strategy.

at:
<http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 67.

¹³²¹ W. Somerville, ‘PD17: Environmental migration governance: debate in the European Union’, review commissioned as part of the UK Government’s Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p. 14.

Conclusion and policy recommendations

Centred around the notion of international adaptive migration, this doctoral study aimed to discuss whether existing legal and policy frameworks in the field of international environmental law and European migration law are sufficiently equipped to facilitate international migration as an adaptation strategy to environmental disruptions, and to analyse if and how those frameworks should be adapted to this end.

The first PART of this thesis conceptualised international adaptive migration within the more general notion of environment-induced human mobility. Worldwide, environmental changes are affecting national and international migration patterns, both directly and indirectly, through their influence on the social, economic and political drivers of migration. Sudden natural hazards, such as floods, earthquakes and hurricanes are forcing millions of people out of their houses, while slow-onset environmental degradation, such as desertification, biodiversity loss and sea level rise, seriously threatens people's livelihood. The impact of environmental degradation on migration is expected to increase in the future, as global warming will act as a threat multiplier, causing profound changes in people's environment and livelihood provision.

The past decennia brought forth plenty of studies on how these environmental push factors affect the volume and patterns of global human mobility. The environment appears to influence migration in three ways. Evidence from field-based research confirmed that environmental changes act as a driver for internal as well as international migration. However, remarkably, people not only migrate out of areas with high environmental risks, but they also move into vulnerable areas, such as low-lying urban areas in mega-deltas or slums in flood prone cities. Furthermore, environmental degradation also leads to "immobility", as it often limits people's capacity to move. After all, migration requires substantial social, economic and human capital. As the adverse effects of climate change will dismantle parts of this capital, it is expected that large populations will become "trapped" in vulnerable regions, without being able to migrate to better areas¹³²².

As the cause-and-effect relationship between environmental change and human mobility has been the topic of a large body of empirical research, policymakers at national and international levels now need to consider how to adequately address the current and future challenges in the context of

¹³²² Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011.

migration and environmental change. As shown in Chapter I of this study, one of the shortcomings of the existing legal research on environment-induced migration are the attempts to treat the issue as “a single phenomenon that can be discussed in a general way”¹³²³. However, the classification proposed in Chapter I demonstrates the existence of a wide variety of origins and types of environment-induced population movements. Consequently, a “one-size-fits-all approach” cannot provide an adequate answer to the different challenges posed by this variety of population movements¹³²⁴. It is clear that it is only by treating them differently, adapted to the specific circumstances of the movement as well as to the needs of migrants and displaced persons, that a comprehensive and adequate approach to the issue is possible.

A whole spectrum of solutions has been proposed to respond to the challenges which environmental changes pose to human mobility. Within this debate, it is on the one hand crucial to discuss which possibilities can allow vulnerable communities to remain in their original habitat, while it is on the other hand necessary to examine how to protect environmentally-displaced persons who have no other option but to leave their destructed environment. Indeed, while people have a right to leave their country in the face of environmental changes, we are still far from establishing a right to asylum for displaced persons whose survival is at threat due to environmental disruptions. Extended interpretations of *non-refoulement* provisions could perhaps lead to the development of legislative protection mechanisms in the future. In the EU, for instance the Temporary Protection Directive offers an already existing mechanism which, even though it remained dead letter law up till now, could provide some of the necessary protection to victims of natural disasters, combined with assisted return programmes focusing on rebuilding the region of origin. This way, the EU could move beyond the current *ad hoc* provision of temporary relief.

However, one of the most important messages from environmental and social scientists is that we need to increase the range of adaptation alternatives available to vulnerable communities. In this sense, human mobility itself has been recognised as an important adaptation strategy. Both ‘planned relocation’, moving populations in an organised way to less vulnerable places and ‘facilitated migration’, broadening the opportunities for individuals to migrate, can help people to adapt to a changing environment. Among other things, migration can provide individuals and communities with an alternative livelihood when they are faced with environmental disasters, can relieve population pressure in affected areas, and reduce the risk of forced environment-induced displacement.

¹³²³ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 186.

¹³²⁴ J. McAdam, *Climate Change, Forced Migration and International law*, Oxford University Press, Oxford, 2012, p. 186-187.

Migration can thus reduce people's vulnerability to environmental changes, and increase the resilience and adaptive capacity of individuals, households and communities.

PART II and III of this study focused on the legal frameworks needed to facilitate international migration as a strategy to adapt to a changing environment. The central research question which PART II aimed to scrutinize concerned the opportunities and limitations of international environmental law in dealing with environment-induced migration. Obviously, all branches of international environmental law are crucial to prevent environmental degradation, and thus environment-induced migration from happening in the first place. Chapter IV has described how the issue of environment-induced migration has entered into the regime of the UNFCCC through the Cancun Agreements adopted in 2010. Paragraph 14(f) of the Cancun Agreements, which includes the first ever mentioning of human mobility in an official COP decision in the UNFCCC regime, has an important symbolic and political value, as it drew more international attention to the topic of environment-induced human mobility. It not only invites State Parties to the Convention to address the issue by enhancing understanding, coordination and cooperation at different policy levels, but it also signifies a first time ever recognition of the influence of climate change on human mobility in such a politically high profile framework. So while this reference to migration in the Cancun Agreements does not contain legally-binding obligations, it could open the way for more and better integrated migration-related adaptation actions in the field. Measures concerning migration, displacement and planned relocation are now considered as part of adaptation action, and might thus in the future qualify for adaptation funding. Likewise, mechanisms such as NAPAs and NAPs could implement this migration provision into national adaptation planning, while the new Warsaw Loss and Damage Mechanism could help to advance the issue of international adaptive migration in yet another area of the UNFCCC regime.

As for the other two multilateral environmental agreements initiated at the Rio Earth Summit in 1992, it has been concluded that both the UNCCD and the CBD have had much less relevance for the issue of environment-induced migration than the UNFCCC regime. While one of the main implications of the incorporation of the topic into the UNFCCC regime was the growing global attention among international and national policymakers, the same development did not take place in the context of the two other Rio Conventions. Both these conventions are not only institutionally weaker, they also have less financial means available than the UNFCCC regime, and, importantly, they are politically more low profile. They are thus less capable of drawing the same kind of global attention to the issue of environment-induced population movements. However, the implementation mechanisms of both the UNCCD and the CBD might have some relevance for the

issue at the national level, as they too can, to a limited extent, include measures regarding migration, displacement or planned relocation, for example in the NAPs of the UNCCD or the CBD's NBSAPs. By making adaptive migration part of these implementation mechanisms, they could further enhance the impact of national strategies and action plans in the context of environment-induced population movements. To this end, the three Rio Conventions should cooperate more closely.

Nonetheless, whether or not international adaptive migration is an option when faced with environmental degradation depends on the opportunity people have to migrate in a humane and legal way, as well as on the balance between the costs and benefits of migration. In the absence of an international convention in this area, these questions remain for a large part a matter of state sovereignty, and should therefore be addressed in national and regional migration law and policy. It can thus be concluded that the inclusion of migration in international environmental law has worked as a catalyst for the issue of international adaptive migration, opening opportunities for funding and implementation action at the national level, and giving the topic more legitimacy among both developed and developing countries, thereby paving the way for the facilitation of international adaptive migration through migration law and policy. Indeed, it was only after the inclusion of climate-induced migration into the UNFCCC regime by the Cancun Agreements, that the EU started to consider the issue as part of its Global Approach to Migration and Mobility¹³²⁵.

The last PART of this thesis therefore took a more regional approach, and assessed if and how EU migration law could facilitate international adaptive migration. While the debate on environment-induced migration at the EU policy level was at first only determined by security concerns and the question of the protection of environmentally-displaced persons, it now took a more balanced approach. Ever since the Council invited the Commission in the 2010 Stockholm Programme to present its analysis on the effects of climate change on international migration, the debate has slowly developed. With its Staff Working Document of April 2013, the European Commission finally recognised the changing evidence base on environment-induced population movements, and considered a better informed and more comprehensive policy approach to the issue. The Commission even proposed to foster greater mobility to promote and facilitate migration as an

¹³²⁵ C. Cournil et al., 'Human Rights and Climate Change : EU Policy Options', Study requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies, August 2012, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=76255>, p. 68.

adaptation strategy¹³²⁶. However, it did not elaborate on the way this should be done, so more reflection is needed in this area.

This study aimed to provide a starting point for this reflection and further dialogue, by touching upon some concrete actions and relevant tools at the EU policy level, which would be able to facilitate international adaptive migration. Current governance frameworks and policy measures were identified as possible tools to broaden migration opportunities for individuals or groups of persons affected by environmental degradation, or to optimise the benefits of migration as an adaptation strategy. In the context of the Global Approach to Migration and Mobility, lessons can for instance be learned from the experience gained while implementing measures to maximise the development impact of migration for countries of origin, such as measures regarding remittance transfers or the promotion of circular and return migration as development tools¹³²⁷. Labour migration in general was identified as an effective strategy of income diversification for affected communities, while circular migration in particular has some additional advantages in the context of recurring environmental disruptions. Circular migrants could substantially contribute to the resilience and adaptive capacity of their families and home community, for instance through the knowledge and skills they bring back to their region of origin. In promoting labour migration as an adaptation strategy, sufficient attention should be given to the up-skilling of the community of origin, so as to make adaptive migration also work for the most vulnerable people and communities. Furthermore, respect for migrants' rights and working conditions remains a *condition sine qua non* for international adaptive migration.

Similar to the idea that labour migration could be oriented towards countries or regions of origin affected by environmental change, such "humanitarian admissions" could also be realised through other migration categories, such as family reunification or student visa. Furthermore, through the Joint EU Resettlement Programme, the EU could also support planned and organised resettlement as a coping strategy for affected or vulnerable individuals or groups of persons. Through planned and organised relocation or resettlement, even 'trapped populations' could be supported to leave their destructed environment in a legal and humane way, rather than being displaced in or outside their

¹³²⁶ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on 'An EU Strategy on adaptation to climate change', SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 28-29.

¹³²⁷ European Commission, Commission Staff Working Document on 'Climate change, environmental degradation, and migration', accompanying the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* on 'An EU Strategy on adaptation to climate change', SWD(2013) 138 final, Brussels, 16 April 2013, available at: http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf, p. 27.

country of origin. And finally, a comprehensive approach to environment-induced migration also takes the possibility of the return of migrants and displaced persons into account. After all, not only does a return to the country of origin becomes an obligation in absence of a residence permit, for many migrants a return to their community of origin remains a desire. Through assisted return and reintegration programmes, a safe and durable return and reintegration in the community of origin can be facilitated for regions which are not rendered permanently uninhabitable, or where human life is (again) possible after a period of recovery or ecological restoration. In order to fully take account of the environmental drivers of migration and offer the returnees sufficient perspectives in their region of origin, return and reintegration projects should also address adaptation needs in the home region, and could even be coupled to ecological restoration programmes.

The above mentioned governance approaches and policy options could be part of the external dimension of the EU's migration policy. Better organising legal migration has been recognised as one of the pillars of the Global Approach to Migration and Mobility, together with the strengthening of synergies between migration and development and the reduction of irregular migration. Through migration cooperation with third countries, future initiatives on the facilitation of legal migration could be more specifically targeted towards communities and regions at risk of slow-onset environmental degradation or sudden-onset natural hazards. In this context, the EU Mobility Partnerships could act as umbrella partnerships for further cooperation between EU Member States and third countries, for instance regarding the provision of migration opportunities for affected communities. Finally, in order to fully integrate the concept of adaptive migration into the EU's migration policy, inter-sectoral and institutional cooperation between different actors in the field of migration, development and environmental change is crucial, including at the EU policy level (for instance between the DG HOME, the DG DEVCO, the DG ECHO, the DG CLIMA and the European External Action Service).

The role which the above mentioned tools and policy measures can play in the context of migration and environmental change should now be further explored. Hopefully, the Commission's Staff Working Paper as well as the earlier developments in the UNFCCC regime can take the policy agenda forward at the EU and national policy level. It is important to stress that the legal solutions, frameworks and instruments discussed in this thesis are not mutually exclusive. The issue of environment-induced human mobility cannot be comprehensively dealt with within one single legal framework. International environmental law and regional migration law are thus complementary frameworks to address the challenges posed by the influence of environmental change on migration, and are both indispensable to make international migration work as an adaptation strategy. For

instance, migration opportunities for people affected by environmental degradation should be explored in national and regional migration law, but this should not rule out a parallel treatment of the issue in international environmental law. Migration could for instance be better integrated into NAPAs, while migration agreements could specifically target regions affected by environmental disruptions.

Now that human mobility has finally found its entrance into the UNFCCC regime, policymakers increasingly ask how they should adapt their own legal, institutional and governance approaches at the regional and national level. This study has shown that an “interplay” of tools to facilitate migration as an adaptation strategy is already available at different policy levels, including the financial regimes and national implementation mechanisms of the Rio Conventions as well as different EU policy tools in the area of the immigration of third country nationals. Important to note is the fact that the above recommended governance approaches and policy tools are of an essential political nature. The way forward is thus a political one, and will, among others, depend on how the public opinion evolves on this issue. Now that the security narrative has been left aside by academics and policymakers, awareness should thus be raised among the general public regarding both the challenges and opportunities offered by environment-induced population movements. In part this will be a challenge of shifting culture, but the more detail and evidence we can provide the better.

Research has thus an important role to play to convince both policymakers and the general public of how international adaptive migration may enhance the adaptive capacity of communities and contribute to resilience building and socio-economic development. In order to adequately assess and support this role of adaptive migration, more specific and policy-oriented research is now needed, as well as more funding to be allocated to pilot projects regarding adaptive migration. It is now, among others, up to the academic community to fill the remaining knowledge gaps, and to support decision-makers in addressing environment-induced displacement and in making migration work for adaptation. Aside from being an end point of many years of negotiations on climate-induced migration, paragraph 14(f) of the Cancun Adaptation Framework also provides a “point of departure in this journey”¹³²⁸.

Finally, one of the most important messages in this thesis is the idea that environment-induced migration should not only be seen as a “problem”, that is, as a failure to adapt to a changing

¹³²⁸ K. Warner, ‘PD23: Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’, Review commissioned as part of the UK Government’s Foresight Project ‘Migration and Global Environmental Change’, October 2011, available at: <http://bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1269-pd23-migration-displacement-in-adaptation-climate-change.pdf>, p. 31-32.

environment. Instead, it can also be regarded as a “solution”, namely as an adaptation strategy itself. The issue of environment-induced migration offers an opportunity to change traditional thinking about human mobility. More in particular, it puts pressure on the traditional division between forced and voluntary movement, and in policy terms, between our migration and asylum policy. While it has been shown that broadening migration opportunities for environmentally-vulnerable people can effectively work as an adaptation strategy, most migration categories were up till now based on the personal situation of the individual migrant (e.g. through family reunification) or on the situation of the labour market in the destination country. Broadening migration opportunities for environmentally-affected persons as a means to support their adaptive capacity and that of their larger communities, would introduce a humanitarian perspective into migration policy. By doing this, we would take the developments within the international climate change regime another step further, and fully recognize environmental impacts as a legitimate cause of migration. The issue of environment-induced human mobility thus offers a chance for innovative thinking, both regarding adaptation means to the adverse effects of climate change, as well as on migration issues.

The challenges of environment-induced human mobility have led scholars to formulate genuinely ambitious policy proposals to be implemented in international, regional and national legal frameworks on environmental and migration issues. As a leading voice in the debate on climate change as well as a major immigration region, the EU is a crucial stakeholder in the debate on environment-induced population movements¹³²⁹. European policymakers could thus send an important signal to the rest of the world by truly considering international migration as a viable strategy to adapt to a changing environment, and starting to integrate adaptive migration into their migration policy. As the Foresight Report rightly puts, the cost of inaction is likely to be higher than the costs of the proposed policy measures, particularly since they also reduce the likelihood of environment-induced displacement¹³³⁰. Even though the most extreme environmental impacts of global warming and biodiversity loss are still a few steps removed from immediate impact, the broad trend of environmental change we are now experiencing is significant enough to give urgent attention to migration in the context of environmental change, and to make migration work for adaptation.

¹³²⁹ W. Somerville, ‘PD17: Environmental migration governance: debate in the European Union’, review commissioned as part of the UK Government’s Foresight Project, *Migration and Global Environmental Change*, October 2011, available at: <http://bis.gov.uk/assets/bispartners/foresight/docs/migration/policy-development/11-1151-pd17-environmental-migration-governance-european-union.pdf>, p., p. 14-15.

¹³³⁰ Foresight, *Migration and Global Environmental Change. Future Challenges and Opportunities*, Final Project Report, The Government Office for Science, London, 2011, p. 10.

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